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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 890

VILLAGE ON THE HILL, INC.,
PETITIONER,

v.

MASSACHUSETTS TURNPIKE AUTHORITY
and
RIVETT LATHE & GRINDER, INC.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts, entered in the above-entitled case on November 12, 1964.

Opinions Below

The Findings, Rulings, Order for Decree, Amendments and Final Decree of the Superior Court are unreported and

are printed in Appendix C, *infra*, and in the Record, pp. 355-64, 366-67, 368-69.[1] The opinion of the Supreme Judicial Court is reported in Mass. Adv. Sheets 1964 Adv. Sheets 1245 and is printed in Appendix A, *infra*.[2]

Jurisdiction

The judgment of the Supreme Judicial Court was entered on November 12, 1964, and is printed in Appendix B, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).[3]

Questions Presented

1. Whether it is a violation of the Fourteenth Amendment for a state authority to take private property by eminent domain if the use to which the property is put is for purposes of building upon that property a plant of a private corporation.

2. Whether it is a violation of the Fourteenth Amendment for a state authority to take private property by eminent domain if the present and fairly anticipated future use to which the property is put is for purposes of relocating a private street or way which is to terminate in a cul-de-sac at the parking lot of a plant of a private corporation.

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[1] The certified Record, filed with the Clerk of this Court, consists of two consecutively paginated volumes (hereinafter referred to as "1R." or "2R."), a separate volume of exhibits (hereinafter referred to as "3R."), and certain exhibits, not printed elsewhere, which were attached as appendices to the Brief for Plaintiff in the court below (hereinafter referred to as "Pl. Br.").

[2] The opinion also contains references to the court's decision in favor of petitioner in a companion mandamus action, *Village on the Hill, Inc.* v. *Building Commissioner of the City of Boston*. Since this portion of the opinion is irrelevant to the present petition, it is not reprinted.

[3] The raising of the federal question is set out in Appendix E, *infra*, and is discussed in the Statement, *infra*, pp. 10-12.

Constitutional Provisions and Statutes Involved

The text of the pertinent provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States and of Massachusetts Statutes 1952, c. 354, as amended by Massachusetts Statutes 1955, c. 47, and Massachusetts Statutes 1958, c. 384, are set out in Appendix D, *infra*.

Statement

Petitioner brought a Bill in Equity for a declaration of rights arising from the taking by the Massachusetts Turnpike Authority (MTA) of two separate parcels of petitioner's land. The gist of the claim was that the taking of petitioner's property was for the private use and benefit of Rivett Lathe & Grinder, Inc. (Rivett). As such, the taking was illegal, constituted a misuse of the eminent domain power, and deprived petitioner of its property without due process of law in violation of the Fourteenth Amendment of the Federal Constitution (1R.4-5). Petitioner sought a declaration that the order of taking was unlawful, injunctions against respondents and damages (1R. 5-7).

A. Circumstances Relating to the Taking of Petitioner's Land.

1. *Rivett's initial plans for the relocation of its plant in the Faneuil Dump area.*—In 1957, Rivett's President Hunt was informed by MTA Chairman Callahan that, since Rivett's plant would be in the path of the extension of the Massachusetts Turnpike into Boston, it would probably be taken by eminent domain. Hunt was therefore advised to take steps to look for possible sites to relocate the plant (1R. 38-39, 116; 2R. 356, App. C, *infra*, pp. C-1-C-2; App. A, *infra*, p. A-2). In 1960, plans were drawn up (see Ex. 13

A-B, 3R. 23-24) and approval finally given for the approximate location of the turnpike center line and interchange points (see 1R. 35, 2R. 253).

In February or March 1961, MTA representatives showed Hunt the turnpike plans which indicated clearly that the Rivett plant would be in the direct path of the turnpike extension (1R. 118). In March 1961, one of the MTA representatives told Hunt that "there was going to be extra land" available in the Faneuil Dump area, near the Boston-Newton boundary, which might be a suitable site for relocating Rivett's plant (1R. 118; 2R. 356-57, App. C, *infra*, p. C-2; App. A, *infra*, p. A-2), but that, in order to determine its suitability for an industrial plant, MTA was planning to have borings taken (1R. 118). During the year, "several conferences took place at which Hunt indicated that he would be interested in re-locating his plant in this area depending upon factors such as test boring, utilities and access roads" (2R. 357, pp. C, *infra*, p. C-2).

Finally, in April 1962, Hunt received copies of the turnpike plan (Ex. 13 A-B, 3R. 23-24) upon which the results of the test borings in the Faneuil Dump area were indicated. On July 19, 1962, on the basis of this plan, an engineering firm under contract to Rivett drew up preliminary plans (Ex. 12, 3R. 22) for the relocation of the plant in the Faneuil Dump area (1R. 121). Although most of the proposed plant was located on Baltimore and Albany Railroad land, which the MTA had the right to purchase (see App. C, *infra*, p. C-2; App. A, *infra*, p. A-2), the southeastern portion of the plant extended beyond the railroad line into petitioner's land (1R. 122).[4] Hunt was well aware

[4] A simplified map of the area is included in the Supreme Judicial Court's opinion (App. A, *infra*, p. A-3). The building planned by the engineering firm is indicated in dotted lines. The boundary between the railroad and private land is clearly indicated. All other geographical locations relating to this case are also indicated on the court's map.

that private land would therefore be needed for the site (1R. 60, 85).[5]

2. *MTA's plans for the relocation of the Newton Street private way to terminate in the Faneuil Dump area.*—In 1960, the State Public Works Department had given its official approval of MTA's plan only to the extent of the location of the approximate center line and interchange points of the turnpike extension, and not for the relocation of any other highway; MTA engineering consultants, however, had in fact plotted out a proposed extension of the Newton Street private way linking up to Presentation Road in Boston and going across the Boston-Newton boundary into Newton (1R. 35, 2R. 239, 240, 253, 259, 337, 343; 2R. 360, App. C, *infra*, pp. C-6-C-7; see map in App. A, *infra*, p. A-3).

On June 11, 1962, MTA consulting engineers instructed their subcontractors to make studies and submit "recommendation as to a revised location" of Newton Street; the street would no longer be extended across the boundary into Newton, but "would simply provide access to the so-called Faneuil Area." The possibility of eliminating connection to Presentation Road was also to be considered (Ex. 45, 3R. 44; see 2R. 284). On July 26, 1962, the subcontractors submitted their proposed plan for the Newton Street relocation and extension (Ex. 53, 3R. 56; see 2R. 266). The proposal was such as to necessitate taking a portion of petitioner's land (2R. 360-61, App. C, *infra*, pp. C-7-C-8; App. A, *infra*, p. A-5-A-6 n.2).

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[5] Although the Superior Court erroneously found that the proposed plant would be totally "within the confines of the Faneuil Dump area previously owned by the Boston & Albany Railroad" (2R. 357, App. C, *infra*, p. C-2), the Supreme Judicial Court recognized that some of the plant would be on private land (App. A, *infra*, p. A-5).

3. *The oral agreement between Rivett and MTA for the land in the Faneuil Dump area.*—In September 1962, Hunt had no less that five meetings with MTA and city officials to work out the arrangements for the land in the Faneuil area.

At the September 13th meeting, as in three preliminary meetings,[6] Hunt and the various MTA commissioners and officials considered and discussed the July 19th plan (1R. 60-61, 133). Hunt offered $100,000 for the land in the Faneuil Dump area, but only on the condition that the plant would have access to a public road and serviceable public utilities (1R. 134-35, 186-87, 190; 2R. 357, App. C, *infra*, p. C-3; App. A, *infra*, pp. A-2, A-4). The MTA authorities accepted the offer and conditions (1R. 136). In this regard, Callahan informed Hunt that "the proposed relocation of Newton Street would not continue as previously planned to the Newton City line," as shown on Rivett's July 19th plan, "but would stop somewhere in the Faneuil Dump area and that a reserve strip would have to be retained for the future extension of this road into Newton" (2R. 357, App. C, *infra*, p. C-3; App. A, *infra*, p. A-5; see 1R. 134, 143, 178, 188). Hunt was also told that some additional takings of private land were also being planned (see 1R. 67, 174).

At a meeting on September 18th, between Hunt and Mayor Collins of Boston and the MTA officials, the July 19th plan was again displayed and discussed, Callahan informing the Mayor that the MTA would be selling a portion of land in the Faneuil area to Rivett (1R. 73). On the same day, Callahan assured Hunt that the MTA was about to file "the papers on the taking of the land adjacent to the Railroad," which was to be made available for Rivett (1R. 98).

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[6] These meetings were held on September 6th, 10th and 11th (1R. 125, 127-28, 129-30).

4. *Rivett's plans for the relocation of the proposed plant site in the Faneiul Dump area.*—On October 9th, MTA engineers completed a proposed plot plan for the MTA-Rivett agreement. The essential differences between this plan and Rivett's July 19th plan was that "a 50 foot reserved right-of-way for future extension of Newton Street" into Newton was placed north of the railroad property line, thereby leaving insufficient room for Rivett's proposed plant on the original land site (1R. 141).

Rivett thereupon instructed a construction company to prepare a new plan for the relocation of the plant site. On October 29th the company completed its plans (Ex. 14, 3R. 25) for the relocation of the plant further to the right of the old site in the Faneuil area. This proposal required the taking of more of petitioner's land than was originally planned on July 19th (1R. 86, 91, 115).[7]

5. *The taking of petitioner's land in and around the Faneuil Dump area.*—Meanwhile, some time in the fall, the City of Boston had put pressure on MTA to place a "turn-around" or "cul-de-sac" at the Faneuil Dump terminus of the relocated Newton Street private way (2R. 309, 354).

Thereafter, MTA promulgated its Order of Taking, which was filed October 18, 1962, and recorded November 7, 1962 (Ex. A, 1R. 8-18). The Order was divided into four sections. The first section (Ex. A, 1R. 10) described the private land, including petitioner's, purported to be taken in fee in the Faneuil Dump area, in which the Rivett plant was thereafter to be built; the other sections (Ex. A, 1R. 11-15) described the private land, including petitioner's, pur-

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[7] "'The relocation . . . deprived Rivett . . . of some 44,000 square feet of relatively level land,' and changed the shape of the lot available for sale. As a consequence, the authority reduced the price to Rivett from $100,000 to $80,000" (App. A, *infra*, p. A-6; see 2 R. 358, App. C, *infra*, p. C-4).

ported to be taken either in fee or for easements for purposes of relocating and constructing the Newton Street private way (see Ex. 22 A-B, Pl. Br. 47-48). The Order set out four general purposes for the taking (Ex. A, 1R. 8-9):

> 1. "For the purpose of constructing, maintaining, repairing and operating as an express toll highway . . . a road . . . known as the 'Boston extension' of the Massachusetts Turnpike . . . .
>
> 2. "[F]or the purpose of relocating public utilities including rail lines, in connection therewith . . . .
>
> 3. "[F]or the purpose of relocating and constructing a portion of a private way (Newton Street) . . . .
>
> 4. "[F]or the purpose of performing such other work as may be deemed necessary in connection therewith . . . ."

Section Four of the Order also stated that the construction and relocation of a portion of the Newton Street private way was deemed necessary "in connection with the construction, maintenance, repair and operation" of the toll highway (Ex. A, 1R. 12). Upon completion, the street was to become "a local public way" (Ex. A, 1R. 12).[8]

6. *The final agreement between MTA and Rivett for the land in the Faneuil Dump area.*—One week later, on November 14, 1962, Rivett's construction firm began clearing

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[8] The extent of the taking, including the relocation of Newton Street and the reservation of the 50 foot strip, were shown on the maps attached to the Order (Ex. 22 A-B, Pl. Br. 47-48). The court held that the City of Boston had "approved the location of Newton Street extended and the plans for the utilities therein." But, although the State Department of Public Works had "approved the re-location of that part of old Newton Street which was a public way," it had "never been requested to approve the re-location or extension of that part of Newton Street which was a private way" (2R. 362, App. C, *infra*, p. C-9; see App. A, *infra*, pp. A-6 - A-7).

the site in the Faneuil area to ready the location for construction (1R. 204; App. A, *infra*, p. A-7).[9] On December 4th, Rivett was notified that MTA Chairman Callahan "had no objections to authorizing [Rivett] to proceed with the construction of the building" (Ex. 32, 3R. 32; see 1R. 98, 197). During that month, "many car loads of materials were delivered to the site and two cranes were working there" (2R. 360, App. C, *infra*, p. C-6; see 1R. 209-11).

Rivett nevertheless continued to worry about the need for access to the Faneuil property. On November 16th, it requested an informal promise from MTA that "Newton Street will be built as access to Rivett . . . property and that the public services will be brought to the property" (Ex. 20; 1R. 147, 180). On November 23rd, MTA confirmed that it proposed "to build relocated Newton Street with utilities installed as indicated on the plan for order of taking" (Ex. 21; 1R. 148, 180).

Finally, on January 17, 1963, Rivett and MTA executed the formal purchase and sale agreement for the land in the Faneuil Dump area (Ex. 15, 2R. 377-80). In accordance with the October 29th plan (Ex. 14, 3R. 25), MTA undertook to construct relocated Newton Street to serve as an access to Rivett; to provide water, gas, electricity and sewer connections in the street; and to permit Rivett to use the 50 foot reserve strip as a parking lot (2R. 378, 379).

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[9] On November 19th, the construction firm made application to the Boston Building Commission for the right to construct the plant on the land in the Faneuil area set out in the October 29th plan (Ex. B, 1R. 19; Ex. 7, 2R. 375). Rivett was listed as owner of the land (1R. 201-02). The trial court found that the construction engineering firm was "not aware of the legal niceties of the situation in which title had not yet passed to Rivett . . . but considered Rivett . . . to be the owner in view of the agreement that construction could start on the site" (2R. 359, App. C, *infra*, p. C-6; see App. A, *infra*, p. A-7 n.4). In this regard, the formal contract between Rivett and the construction firm, dated December 5, 1962, and signed January 2, 1963, was headed "Between Owner and Contractor" (1R. 44-46).

Rivett was further given permission, "at its sole risk and expense," to enter upon the premises for purposes of site preparation and construction of the new plant (2R. 280).[10]

During the trial, the building being constructed by Rivett "was nearing completion and ready for the installation of machinery" and "the parking lot . . . had been staked out and graded in rough form"; after the trial, "work . . . continued on the building and parking lot" (2R. 366-67, App. C, *infra*, p. C-12; see App. A, *infra*, p. A-7).

At the same time, MTA undertook the construction of relocated Newton Street and the laying of the public utilities therein. The Rivett plant was to be the only building served by the street and the utilities at that time. The cul-de-sac at the end of the street was ultimately located in the parking lot of the Rivett plant (1R. 174); the twelve inch water main came to a dead end at the eight inch pipe leading into the Rivett plant; the gas main increased in size from four to six inches as it went by the Rivett plant; the ten inch sewer terminated at the plant; and a surface drain increased in size as it neared the plant (2R. 255-58). MTA made no further takings or street lay-outs either "along the 50 foot reserve strip" or "on the other side of the Newton line, leading off from that reserve strip" (2R. 252).

B. The Raising of the Federal Question

On April 11, 1963, petitioner filed its Bill in Equity for a declaration of rights arising from the taking. Petitioner's

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[10] At the time of the lower court's decision, September 4, 1963, MTA had still not conveyed the land to Rivett, and legal title to the land and building being constructed by Rivett remained in MTA. The court found, however, that it was "the present intention of the parties to go through with and fulfill the terms of the purchase and sale agreement" (2R. 359, App. C, *infra*, p. C-5; see App. A, *infra*, p. A-7).

fundamental claim was that the taking of its land was not for a public purpose, but rather—with respect to the land in the Faneuil Dump area—was "for purpose of sale or lease . . . [to Rivett], for its private use" (1R. 3, paragraph 8), and—with respect to the land taken for the construction and relocation of the Newton Street private way—"was actually . . . for the private use of accommodating . . . Rivett" (1R. 3, paragraph 9). The federal question was raised by the claim that the defendants had misused "the power of eminent domain entrusted to the Massachusetts Turnpike Authority by the Legislature" and were "attempting to deprive the plaintiff of its property in violation of . . . the 14th Amendment of the Federal Constitution" (1R. 4-5, paragraph 15).[11] This claim of unlawful takings for private purposes remained the central issue throughout the trial (see, *e.g.*, 1R. 214-15; 2R. 339-40).

At the end of the trial, petitioner requested certain rulings, including the ruling that "as matter of law, the evidence discloses that no public purpose was served or was to be served by the taking of the plaintiff's land." The court denied the request (2R. 363, App. C, *infra*, p. C-10).[12] In its Findings and Rulings, the court held that the "Authority did not take the Petitioner's land for the purpose of sale or lease . . . to Rivett . . . for its private use or accommodation . . . [or] under the guise of public need with a design of depriving the Petitioner of its property for the private need of Rivett" (2R. 363, App. C, *infra*, p. C-10). In its amended findings, the court added that "at the time of the taking of the Petitioner's land the engineers planning the Turnpike, and the members of

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[11] The text of paragraphs 8, 9, 10, 11, 14 and 15 of the Bill in Equity (1R. 3-5) are reprinted in Appendix E, *infra*, pp. E-1 - E-2).

[12] Requests Nos. 3, 4, 7, 11 and 12, along with the court's rulings are set out in Appendix E, *infra*, pp. E-2 - E-3.

the Turnpike Authority knew that no part of the Petitioner's land was to be used for the Turnpike Extension itself (actual roadway), or for the Railroad easements, or for the relocation of any public utilities" (2R. 367, App. C, *infra*, p. C-12). In the final decree, the court concluded that the taking had been "for a public purpose and not for the private need of Rivett . . . ." (2R. 368, App. C, *infra*, p. C-14).

On appeal, petitioner again urged that "the taking of plaintiff's land was not for a public purpose but rather for the private use and accommodation of the defendant Rivett" (Pl. Br. 2) and that the taking thereby violated the Fourteenth Amendment (Pl. Br. 3).[13] The Supreme Judicial Court acknowledged that petitioner had "appealed from a final decree that the authority's taking of Village's land 'was a taking for a public purpose and not for the private need of Rivett' " (App. A, *infra*, p. A-1). The court, however, upheld the decree, finding that the judge's ultimate conclusions of fact were fully supported by the Record and that the Authority had had ample power to make reasonable provision for access to the Faneuil Dump area, and to sell the excess land "as a proper 'by-product' of the public purpose involved in the construction of the turnpike extension" (App. A, *infra*, p. A-9).

Reasons for Granting the Writ

This petition raises for decision the constitutional scope and limitation of the power exercised by a state authority in taking private property by eminent domain. The critical issue here is whether petitioner's property was unlawfully taken for private use, rather than for a legitimate public purpose. The crucial importance of this issue cannot be gainsaid.

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[13] The pertinent allegations on appeal are reprinted in Appendix E, *infra*, pp. E-3 - E-4.

As early as the turn of the last century, another State Supreme Court—that of Nebraska—had refused to invalidate a taking in the face of an argument that the taking was of private property for a private use. *State* v. *Missouri Pac. Ry.*, 29 Neb. 550, 45 N.W. 785 (1890). This Court reversed and held that the due process clause of the Fourteenth Amendment prohibited a state from taking private property for a private use. *Missouri Pac. Ry.* v. *Nebraska*, 164 U.S. 403, (1896). "[T]he order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners, for the purpose of building and maintaining their [grain] elevator upon it, was, in essence and effect, a taking of private property of the railroad corporation, for the private use of petitioners" (*id.* at 417).[14] Once again the highest court of the state has refused to invalidate a taking of private property for a private benefit and use in a case which parallels the *Missouri Pacific* case and which therefore requires equivalent rectification.

The present petition also raises for decision the scope of this court's ruling in *Rindge Co.* v. *County of Los Angeles*, 262 U.S. 700, 707 (1923), that the taking of private land will be considered as a taking for public use only if the use is for "the present demands of the public" —or at the most for demands "which may be fairly anticipated in the future."[15] The facts of the present case make clear that no "present" or "fairly anticipated" future

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[14] The Massachusetts Court in other days also subscribed to this doctrine. See *Opinion of the Justices*, 261 Mass. 556, 611-12 (1927): "[T]he Commonwealth has no power to expend public money for the purpose of acquiring property with the intention of selling or transferring the whole or any substantial part of the property so acquired to private individuals."

[15] Cf. *Porter* v. *Charleston*, 65 F. Supp. 224 (S.D. W. Va. 1946); *State ex rel. Duluth* v. *Duluth Street Ry.*, 179 Minn. 548, 229 N.W. 883 (1930); *Board of Educ.* v. *Baczewski*, 340 Mich. 265, 65 N.W.2d 810 (1954).

public purpose was served by the taking of petitioner's land.

The case digests have so far failed to yield a situation in which a more callous and premeditated disregard for constitutionally protected property rights—a more egregious and deliberate taking of private property for a private purpose—has occurred than in the present case. Unless certiorari is granted to review the judgment below, the ominous proposal that the doctrine of public use should be accorded "public interment in the digests" may well come to pass. Comment, 58 Yale L.J. 599, 614 (1949).

I. Petitioner's Land Used as the Site of Rivett's New Plant Was Taken for a Private Use and Purpose

From the facts of record, the only conclusion possible is that petitioner's land in the Faneuil Dump area was intended to be taken and was in fact taken by MTA for Rivett's private use and benefit.

As early as March 1961, the MTA indicated that it was prepared to make land in the Faneuil Dump area available to Rivett for purposes of building a new plant (1R. 118; 2R. 356-57, App. C, *infra*, p. C-2; App. A, *infra*, p. A-2), and, as early as July 19, 1962, it became clear that private land in the Faneuil area—which happened to belong to petitioner—would be needed for the plant site (1R. 60, 85, 122; see App. A, *infra*, p. A-5). During September 1962, this need for private land for the plant site was made known to MTA on at least five separate occasions (see 1R. 60-61, 73, 125, 127-28, 129-30, 133). On September 13, 1962, the MTA Chairman informed Rivett's President that additional takings of private land were being planned (1R. 67, 174), and, on September 18th, the Chairman assured Rivett's President that private land adjacent to the railroad in the Faneuil area would be made available to

Rivett for its plant site (1R. 98). Nine days before the taking, it became apparent to all concerned that Rivett would have to relocate its plant to an even larger area of petitioner's land (see 1R. 141), which land was subsequently taken by the MTA on October 18 (see Ex. A, 1R. 10). Approximately nine days prior to the recording of the Taking Order, Rivett completed its plans for relocating its plant on the very parcel of land taken on October 18th (Ex. 14, 3R. 25; 1R. 86, 91, 115). Finally, on November 14th, one week after the recording of the Taking Order, and two months prior to the formal execution of the purchase and sale agreement of the land, Rivett began clearing the site and readying it for construction (1R. 204). Plant construction continued throughout the next year (2R. 366-67, App. C, *infra*, p. C-12).

Nothing in the Record supports the Massachusetts Court's conclusion that the taking of the land was "a proper 'by-product' of the public purpose involved in the construction of the turnpike extension" (App. A, *infra*, p. A-9), and, as such, could appropriately be sold by MTA once it became "excess to the authority's needs" (*ibid.*).

The Order of Taking was quite explicit in the purposes for which the land was to be taken. The first purpose was for "constructing, maintaining, repairing and operating" the new turnpike extension (Ex. A, 1R. 8-9). But the evidence was clear that petitioner's land in the Faneuil area had no connection with the Turnpike, nor with its construction, maintenance, repair or operation (2R. 292-93), and, the trial court held that "no part of the Petitioner's land was to be used for the Turnpike Extension itself" (2R. 367, App. C, *infra*, p. C-12).

The second purpose was for "relocating public utilities, including rail lines" (Ex. A, 1R. 9). Again the evidence showed (see 2R. 300, 354), and the trial court held (2R.

367, App. C, *infra*, p. C-12), that none of petitioner's land was to be used for relocating these facilities.

With respect to the third purpose, the Order of Taking itself made clear (Ex. A, 1R. 11-15) that petitioner's *land in the Faneuil area* was not to be used "for the purpose of relocating and constructing a portion of a private way (Newton Street)" (Ex. A, 1R. 9).

Nor could the general "purpose of performing such other work as may be deemed necessary in connection therewith" serve as a valid excuse when no specific reason, other than the construction of Rivett's plant, was ever offered either in evidence or by judicial fiat below. The only conclusion possible, therefore, is that petitioner's land in the Faneuil area was taken for a private use and benefit in violation of the Fourteenth Amendment.

II. Petitioner's Land Used for the Construction and Relocation of the Newton Street Private Way Was Also Taken for a Private Use and Purpose

The evidence is equally clear that the taking of petitioner's land for "relocating and constructing" the Newton Street private way (Ex. A, 1R. 9) was neither for a "present" nor for a "fairly anticipated" future public purpose (*Rindge Co.* v. *County of Los Angeles, supra,* 262 U.S. at 707), but was rather for Rivett's private accommodation in providing access to its new plant (see 2R. 293).

There can be no dispute that Newton Street was intended to provide access solely to "a dead end in the Faneuil Yard at the property line of the B & A Railroad" (2R. 284; see Ex. 45, 3R. 44). Nor can there be any disagreement that the condition for Rivett's purchase of the land in the Faneuil area was that the plant was to have access to a public road and serviceable public utilities (1R. 134-35, 186-87, 190), and that, when the MTA accepted the condi-

tion, Rivett was informed that Newton Street "would stop somewhere in the Faneuil Dump area" (2R. 357, App. C, *infra*, p. C-3; App. A, *infra*, p. A-5). Soon thereafter, the City of Boston required that a "cul-de-sac" be placed at the Faneuil Dump terminus of the relocated street (2R. 309, 354), and—whether by "coincidence" or not (2R. 286; see 2R. 361, App. C, *infra*, p. C-8)—the cul-de-sac was in fact located in the parking lot of the Rivett plant (1R. 174). In similar manner the utilities installed in the relocated street serviced only the Rivett plant (see 2R. 251, 255-58).

It can be no answer to petitioner's objection that, according to Section Four of the Order of Taking, the construction and relocation of Newton Street was deemed necessary "in connection with the construction, maintenance, repair and operation" of the turnpike (Ex. A, 1R. 12). Since there was to be no access from Newton Street to the Turnpike, the evidence in the Record was clear (2R. 254), and the trial court so held (2R. 367, App. C, *infra*, p. C-12), that there was no connection whatsoever between the street relocation and the Turnpike itself.

Nor may respondents derive solace from the fact that the 50 foot strip of land used for Rivett's parking lot (see Ex. 15, 2R. 379) was reserved for the possible future extension of Newton Street over the Boston-Newton boundary into Newton (2R. 357, App. C, *infra*, p. C-3; 1R. 141); or that Newton Street was so designed that it could be linked up with other roads in the future (see 2R. 331-33); or that the design of the utilities located in the street was sufficient to provide for the future needs of the area (see 2R. 326-30).

At no time did the Commonwealth or its Public Works Department ever approve of an extension of either the public or private way portions of Newton Street into Newton or into adjacent Boston streets (2R. 360, App. C, *infra*,

p. C-6; 1R. 35, 2R. 253). And while the MTA had noted the extension of Newton Street to Newton in its 1960 plan, on June 11, 1962, it expressly directed that the street was not to be extended across the boundary into Newton or connected with Presentation Road, but was rather to provide access solely to the Faneuil area (Ex. 45, 3R. 44). Moreover, at no time did MTA ever make any takings or street lay-outs either "along the 50 foot reserve strip" or "on the other side of the Newton line, leading off from that reserve strip" (2R. 252).

Whatever the *possible* future uses of the street and utilities, the present and "fairly anticipated" future purpose is to serve as a private accommodation for Rivett's plant, and as such is a violation of the Fourteenth Amendment. Alternatively, the question is at least sufficiently in doubt as to require a fuller consideration on the merits.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

OPINION OF THE SUPREME JUDICIAL COURT

S-6493
S-13,180

Village on the Hill, Inc. vs. Massachusetts Turnpike Authority & another.

Same vs. Building Commissioner of Boston.

CUTLER, J. These two cases grow out of the authority's eminent domain taking of land of the plaintiff (Village) in the Brighton district of Boston in connection with extending the Massachusetts turnpike to Boston. The first case, a bill primarily for declaratory relief, alleges that the takings were illegal and part of a plan by the authority and a defendant in the equity suit, Rivett Lathe & Grinder, Inc. (Rivett), to deprive Village of its property for the benefit of Rivett. The bill also seeks injunctive relief concerning the relocation (on or near Village's property) of a private way known as Newton Street and the construction, in part upon land taken from Village, of a factory building designed for Rivett's use. The second case is a petition by Village for a writ of mandamus to compel the building commissioner of Boston to enforce the Boston zoning law (St. 1924, c. 488, § 18) which at the time of the filing of the petition (May 10, 1963) placed in a general residence district part of the land upon which the factory building was being constructed.

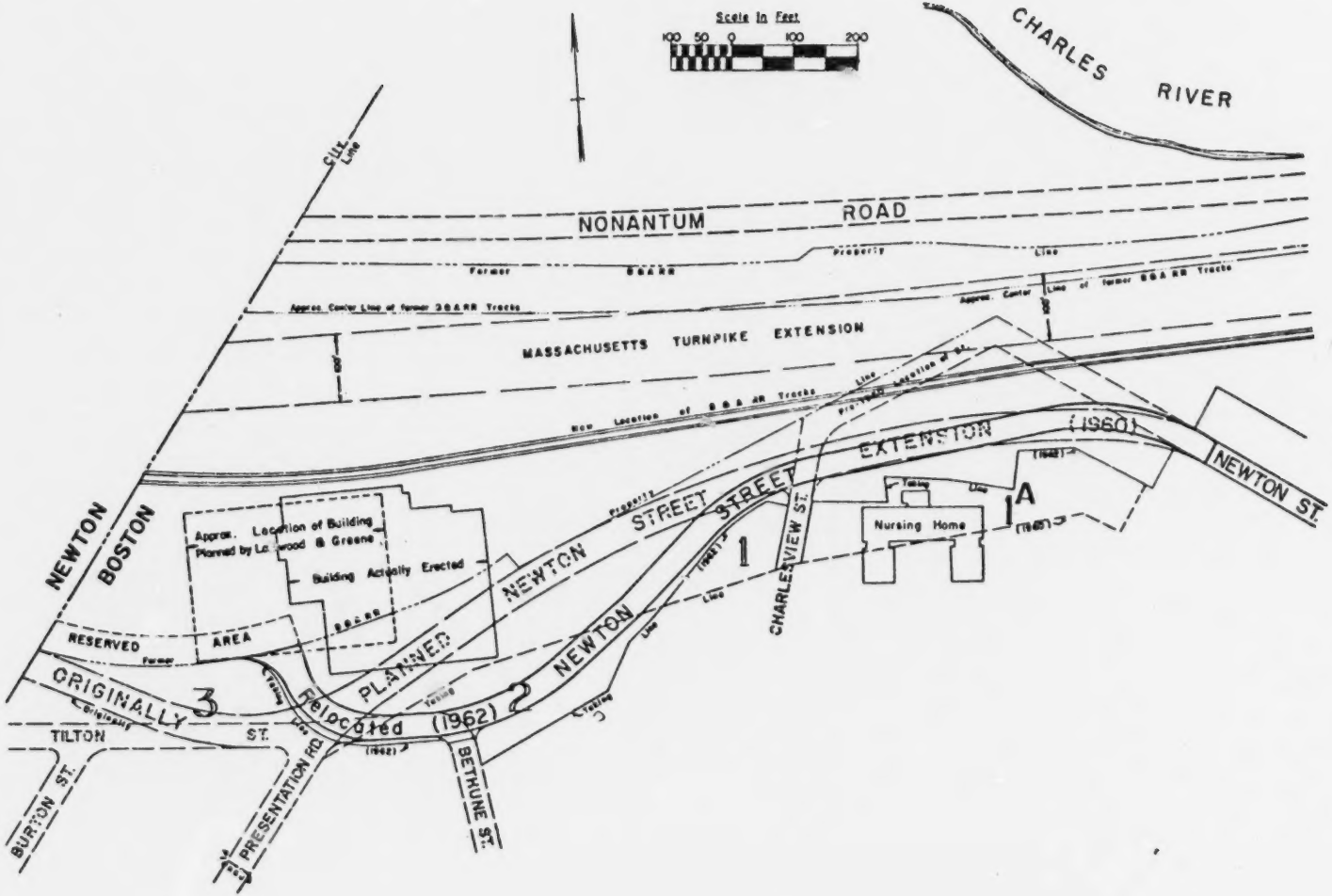
The facts are stated, except as otherwise indicated, upon the basis of the trial judge's findings in these cases. In the equity case, Village has appealed from a final decree that the authority's taking of Village's land "was a taking for a public purpose and not for the private need of Rivett." In the mandamus case, Village has appealed from an order that the petition be denied.

THE EQUITY SUIT.

Rivett owned a plant at a point somewhat east of the area with which the bill is concerned In 1957, one Hunt, Rivett's president, learned from the authority's chairman that the Rivett plant would probably be taken for the turnpike extension. Hunt was advised to "take steps to relocate" the plant. In July, 1959, Hunt and his wife bought a parcel in Waltham and gave Rivett an option to purchase it at the price paid by the Hunts.

There was a delay for some time when plans for selling certain authority bonds were postponed, but in January or February, 1961, Hunt ascertained that the turnpike extension would go through his plant. In March, 1961, representatives of the authority told Hunt that there would be "extra land" in he Faneuil Dump area, near the Newton-Boston boundary, which might be suitable for Rivett's new plant. "This area consisted of land owned by the Boston & Albany Railroad which the . . . [a]uthority had a right to purchase." On July 16, 1962, Hunt received a plan from Rivett's engineers (Lockwood and Greene) indicating "a proposed plant within . . . the Faneuil Dump area previously owned by the . . . [r]ailroad."

At meetings in September, 1962, attended by Hunt and representatives of the authority, Rivett's damages for the


Scale in Feet
100 50 0 100 200
CHARLES RIVER
NONANTUM ROAD
MASSACHUSETTS TURNPIKE EXTENSION
EXTENSION (1960)
NEWTON ST.
NEWTON
BOSTON
City Line
Approx. Location of Building Planned by Lockwood & Greene
Building Actually Erected
RESERVED AREA
ORIGINALLY PLANNED
Relocated (1962)
NEWTON STREET
CHARLESVIEW ST.
Nursing Home
TILTON ST.
BURTON ST.
PRESENTATION RD.
BETHUNE ST.
1
2
3
A

taking of its old plant were determined and Rivett (subject to the approval of its directors) agreed to buy part of the dump area for $100,000 "if access and utilities were" available. Hunt, instead of moving to Waltham or elsewhere, "preferred to relocate . . . in the Brighton area" where most of Rivett's employees lived. Consultations with the mayor and the city's assessing commissioner resulted in assurances (apparently designed to retain Rivett's properties, business, and jobs in Boston) concerning 1963, 1964, and 1965 assessments on the land to be purchased and the building to be constructed by Rivett.

The exhibits show that the proposed turnpike extension in this dump area in general followed the then existing line of the Boston & Albany Railroad. This necessitated moving the railroad tracks to the south and away from the Charles River. There would be no access over the tracks to the proposed turnpike from the dump area. Although the record is not very clear on this point, various exhibits strongly indicate that there would have been no access (except over intervening private land) from any public way to so much of the former railroad dump land as was not needed for the relocated railroad or the turnpike, if the authority had not arranged some extension and relocation of private ways and "paper" streets to the south and east of the dump area.

The attached sketch plan shows the principal features of the Faneuil Dump area and its surroundings.[1] Apart from a strip at the northern edge of the plan, the land immediately east of the Newton-Boston boundary and north of the

[1] The sketch plan is a simplification of various exhibits. The portions of Newton Street, Bethune Street, Presentation Road, and Burton Street in the immediate neighborhood of the dump area were shown as private ways on 1960 Land Court plans of Village's land. The trial judge found (apparently, in part, on the basis of a relocation plan approved by the Department of Public Works) that "Newton Street was a public way . . . [coming from the east, only] to approximately

more southerly line marked "Former B. & A. R.R. Property Line" had been owned by the railroad prior to the turnpike construction. There seems to be no doubt that the authority owned, or had the right to acquire, the railroad land, within which the original Lockwood and Greene plan indicated most of Rivett's new plant could be built (see dotted lines on sketch plan showing approximate location). The authority's 1960 plans showed a projected extension of Newton Street (see fn. 1) "through the former [r]ailroad property . . . westward into Newton" (see the dotted lines marked "originally planned Newton Street Extension"). In mid-September, 1962, Hunt was told by the authority's chairman "that the proposed relocation of Newton Street would not continue as previously planned to the Newton [c]ity line but would stop somewhere in the Faneuil Dump area and that a reserve[d] . . . [area, marked on the sketch plan] would have to be retained for the future extension of this road into Newton." This change appears to have developed in the manner described in the margin.[2]

This 1962 change in the location of Newton Street to the route marked on the sketch plan, "Relocated (1962)

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the point where it joined with Charlesview Street. From this point . . . in a westerly direction . . . a private way called Newton Street . . . [led] to the [railroad] property . . . This . . . was a paper street only and had never been developed."

[2] Under date of June 11, 1962, engineers acting for the authority instructed another engineering firm, DeLeuw, Cather & Co., to make studies and submit "recommendations as to a revised location" of Newton Street. The DeLeuw firm was told that "the portion of Newton Street in Newton will not be constructed," and that it had been suggested "in order to avoid the possibility of affecting . . . [a] nursing home" (see lower right part of sketch plan) that Newton Street be constructed further to the north than had previously been proposed. On July 26, 1962, this firm brought forward a "plan in which the Newton Street extension was made to swing in a southerly direction," which would necessitate taking some of Village's land. The evidence (including a contour plan) indicates (1) that the elevation of the proposed relocation of Newton Street at its junction with Charles-

Newton Street Extension," made it "impossible to locate the Rivett . . . plant wholly on former railroad land. . . . The relocation . . . deprived Rivett . . . of some 44,000 square feet of relatively level land," and changed the shape of the lot available for sale. As a consequence, the authority reduced the price to Rivett from $100,000 to $80,000.

A purchase and sale agreement, dated January 17, 1963, described the revised area as including land "between the southerly border of the former Boston & Albany land and the northerly side of relocated Newton Street." See the sketch plan. The agreement, among other things, provided that Rivett "at its own risk and expense, may enter upon the property for . . . construction of its new plant as soon as the [a]uthority obtains title to . . . premises . . . not then owned by" it.

On October 18, 1962, the authority took some of Village's land. This land lay (see the sketch plan)[3] largely south and east of the former railroad land. The order recited, among other things, that the taking was for the turnpike extension and "for the purpose of relocating and constructing a portion of a private way (Newton Street)." Village's land was taken (as the evidence shows, in January, 1963) for "the [c]ity of Boston and the [c]i.. approved the location of Newton Street extended and the

view Street was about eighty-five feet, and (2) that near where the 1960 planned extension of Newton Street approached the former railroad land the elevation was around thirty-five to forty feet. The distance between the railroad land and the intersection of Newton Street and Charlesview Street (scaled from a map in evidence) is about 480 feet. The 1960 route would thus have dropped about forty-five to fifty feet in 500 feet, a ten percent grade or a little less. The 1962 route made approximately the same descent in 1,040 feet, an average grade of about five percent.

[3] All of the area taken except the area marked "2" would have been taken under the 1960 plan. The areas marked "1," "1A," and "3" would apparently have been taken under the 1960 plan, but were not taken in 1962.

plans for the utilities therein." The Department of Public Works "approved the relocation of that part of old Newton St[reet] which was a public way but has never been requested to approve the relocation . . . of that part . . . which was a private way."

Prior to the date of the judge's findings (September 4, 1963) there had been no conveyance from the authority to Rivett. Legal title to the premises, including the building being constructed there by Rivett, remained in the authority. The judge found, however, that it was "the present intention of the parties to . . . fulfill the terms of the purchase and sale agreement." Rivett started site clearing on November 14, 1962, and at the time of the trial (in late June, 1963) construction of the building was nearly completed.[4]

With respect to the relocation of Newton Street, west of Charlesview Street, the judge made findings. "When Newton Street was relocated farther north[5] to avoid the nursing home, the grade of Newton Street up to its connection with Charlesview Street was increased so that its

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[4] Rivett had agreed that it would be out of its old plant within six months after construction started on the new plant. Because of the need for speed, the use of prefabricated materials was investigated and Rivett signed a construction contract on January 2, 1963. Rivett's contractor applied for a building permit in Rivett's name, because "not aware of the legal niceties of the situation in which title had not yet passed to Rivett."

[5] The evidence does not show that, near the nursing home east of Charlesview Street, Newton Street (as distinguished from the taking line, see sketch plan) was in 1962 moved north from its 1960 planned location. There was evidence, however, that this part of Newton Street was raised in elevation so that "less space for slopes" was required; and that in 1960, when this area was vacant land, the "plans were laid out on the basis of no [retaining] walls" while the "1962 plans . . . [provided] bin-type retaining walls to avoid the taking of new buildings." Apparently these engineering adjustments permitted less of a cut into the hill and thus avoided damage to the nursing home (under construction in 1962). The trial judge's reference to moving Newton Street north in this area probably is to the

high point was at" that connection. "Once this was done, from an engineering standpoint, it was also necessary to bring the Newton Street extension toward Presentation Road in order to avoid excessive fill and excessive grade down" from the high land (see fn. 2) near Charlesview Street "into the former railroad property and also to provide for a more level connection with Presentation Road and Tilton Street, when and if they are extended to meet Newton Street as relocated."

The judge reached the following principal conclusions: (1) The DeLeuw firm (see fn. 2) acted in good faith and in accordance with sound engineering principles in relocating Newton Street and not in an attempt to assist Rivett. (2) The "[a]uthority did not take . . . [Village's] land for the purpose of sale or lease . . . to Rivett . . . [or] under the guise of public need with a design of depriving . . . [Village] of its property for the private need of Rivett."

1. The case was heard upon evidence consisting of numerous exhibits and voluminous oral testimony. The ultimate conclusions of fact of the trial judge are supported by his subsidiary findings and are not shown by the reported evidence to be plainly wrong in any material respect. See *Spiegel* v. *Beacon Participations, Inc.*, 297 Mass. 398, 407-408; *Lima* v. *Avery*, 343 Mass. 179, 180. The judge was justified by the evidence in finding that the relatively minor 1962 adjustments of the authority's origi-

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change in the taking line. His discussion of the 1962 action east of Charlesview Street appears immaterial because the crucial factors in relocating Newton Street west of Charlesview Street were the elevations (see fn. 2) of the planned intersection of these streets (not changed between 1960 and 1962) and the former railroad land. The evidence (engineers' testimony and exhibits) about the topography of the area west of the intersection, by itself, justified the significant finding in effect that, to obtain a proper grade from the intersection to the railroad land, it was good engineering to adopt the 1962 curved relocation of the extension.

nal plans (which had been made as early as 1960) for relocating and extending Newton Street, were based upon sound engineering judgment rather than upon the desire to help Rivett.

The authority had ample power to make reasonable provision for access to the Faneuil Dump land which otherwise would have no direct access to highways after the turnpike construction. See *Luke* v. *Massachusetts Turnpike Authy.*, 337 Mass. 304, 306, 309-310. When the dump area was merely vacant land used in connection with the railroad, it probably needed no greater possibility of access than was afforded by the private, unconstructed portion of Newton Street. After the dump land was acquired by the authority, was reduced in size by the turnpike and relocated rails, and became in part excess to the authority's needs, it was appropriate for the authority (see St. 1952, c. 354, §§ 5 [j], 7) to sell that excess land. Before doing so, it was reasonable for the authority to provide that substantial excess parcel with highway access over a substitute for the originally planned, but unsuitable) 1960 extension of Newton Street. See *Wright* v. *Mayor & City Council of Cambridge,* 238 Mass. 439, 440-441. It was within the power of the authority to take this action as a proper "by-product" of the public purpose involved in the construction of the turnpike extension. See the *Luke* case, 337 Mass. 304, 309. See also *Robie* v. *Massachusetts Turnpike Authy.,* 347 Mass. , — .[5]

2. It is argued that the authority had no power under St. 1952, c. 354, § 7 (as amended by St. 1958, c. 384)[6] to

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[5] Mass. Adv. Sh. (1964) 1067, 1076-1081.

[6] Statute 1952, c. 354, § 7 (as amended by St. 1958, c. 384), provides in part: "If the [a]uthority shall find it necessary to change the location of any portion of *any public highway*, it shall reconstruct the same at such location as the [a]uthority shall deem most favorable, with the approval of the state department of public works, and of substantially the same type and in as good condition as the original

take land in the name of the city unless it did so in order to relocate a public way. In a sense the whole relocation and extension of Newton Street may be viewed as a relocation of the former public way known as Newton Street east of Charlesview Street. If this was the theory on which the authority made the taking, it should have obtained at some time the approval of the whole relocation by the State Department of Public Works, although nothing in §7 makes such approval a condition precedent to the validity of the taking.[7] If obtaining such approval has been omitted by inadvertence, it may be accomplished now.

The old "paper" Newton Street west of Charlesview Street, however, was a private way where it abutted on Village's land. The authority may well have proceeded on the basis that it was only relocating a private way. On this view of the facts, the department's approval was not required, for § 7 does not in express terms require such approval of the relocation of a private way. The question remains, nevertheless, whether the taking in such a case could be made in the name of the city.

The authority had broad authority, under principles discussed above and in the *Luke* case, 337 Mass. 304, 309-310, to take property in its own name to provide access to the Faneuil Dump area. See St. 1952, c. 354, § 5 (j),

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highway. The cost of such reconstruction and any damage incurred in changing the location of any such highway shall be ascertained and paid by the [a]uthority as a part of the cost of the turnpike. In exercising the power herein granted, the [a]uthority may take private property *in the name of a city or town* by exercise of the power of eminent domain . . ." (emphasis supplied).

[7] We see no reason why the authority may not proceed reasonably with its eminent domain program, once it has obtained approval by the Department of Public Works of the general turnpike route, without settling the details of each appropriate relocation of local public ways, private ways, and rights of access. See St. 1952, c. 354, § 1, as amended through St. 1955, c. 47; *Robie* v. *Massachusetts Turnpike Authy*, 347 Mass. , — (Mass. Adv. Sh. [1964] 1067, 1070-1072).

(k), (p). After such a taking, the authority, as a reasonable method of providing such access, could have transferred the westerly part of Newton Street to the city so that it could take action to lay it out as a public way (see St. 1906, c. 393, §§ 1, 2, as amended respectively through Sp. St. 1917, c. 318, and St. 1957, c. 20). What the authority has in effect done is to do in one step, by a taking in the name of the city, what it could have done by a taking in its own name followed by other action.

Where the taking of the western end of the street was so closely related to the duly approved relocation of the former public portion of Newton Street, we hold that it was authorized by § 7. The creation of the extension of Newton Street as a public way may now be perfected either by obtaining the department's approval of the whole relocation or by city action to lay out the western end of the street as a public way.

Appendix B

JUDGMENT OF THE SUPREME JUDICIAL COURT

November 12, 1964. Decree Affirmed.
Rescript November 12, 1964.

Appendix C

Opinion of the Superior Court

1. *Findings, Rulings and Order for Decree*

This is a bill in equity brought under Chapter 231A seeking a declaration of the respective rights of the parties growing out of a taking by the Massachusetts Turnpike Authority of certain land belonging to the plaintiff. It is alleged that the taking was illegal and it was part of a preconceived plan by the Massachusetts Turnpike Authority and Rivett Lathe & Grinder, Inc. to deprive the plaintiff of its property for the benefit of Rivett, Lathe & Grinder, Inc.

The Massachusetts Turnpike Authority by order of taking designated as No. B37, dated October 18, 1962 and recorded in the Land Court in Suffolk Registry District on November 7, 1962, purported to take in fee simple certain land of the plaintiff described in said order and certain permanent easements in the land of the plaintiff further described in said order, which recited that the taking was "for the purpose of constructing, maintaining, repairing and operating as an express toll highway in accordance with the location approved by the State Department of Public Works on April 12, 1960, a road in the City of Boston, County of Suffolk, 'Boston Extension' of the Massachusetts Turnpike, and for the purpose of relocating public utilities, rail lines in connection therewith; for the purpose of relocating and constructing a portion of a private way (Newton Street) and for the purpose of performing such other work as may be deemed necessary in connection therewith. . . ."

Rivett, Lathe & Grinder, Inc. owned and operated, for many years, a plant at 20 Riverview Road, Brighton. Its president, Mr. Albert Hunt, first heard that the plant was in danger of being taken for the extension of the turnpike

sometime in 1957 at which time, after a meeting with Mr. William Callahan, the Chairman of the Turnpike Authority, was advised to begin to look for possible sites upon which to relocate his plant. He examined sites in Lowell, Brockton, Lexington, Waltham and in July of 1959, he and his wife purchased a parcel of land in Waltham and gave an option to Rivett, Lathe & Grinder, Inc. to repurchase it for a plant site at the same price which he and his wife had paid. An engineering firm, Lockwood and Greene, was engaged to prepare a preliminary study of plant requirements including area and plant lay-out. Interest lagged for a while when the plans for selling the turnpike bonds were postponed, but in January or February of 1961, Hunt went to the office of the Massachusetts Turnpike Authority to inquire about any possible changes in plans and was given a copy of a plan dated March 14, 1960 (Exhibit 13b) which indicated that the railroad tracks were to be moved toward the river, the turnpike would be located to the south of the railroad and that it would go right through the location of his plant. Sometime in March of 1961, a representative of the Massachusetts Turnpike Authority indicated to Mr. Hunt that there might be surplus land in the so-called Faneuil Dump area and would be available for building purposes. This area consisted of land owned by the Boston & Albany Railroad which the Massachusetts Turnpike Authority had a right to purchase. Several conferences took place at which Hunt indicated that he would be interested in re-locating his plant in this area depending upon factors such as test boring, utilities and access roads. Because the turnpike bonds did not sell until March of 1962 nothing further was done until mid-July 1962 when Lockwood-Greene prepared a sketch (Exhibit 12) showing a proposed plant within the confines of the Faneuil Dump area previously owned by the Boston & Albany Railroad.

Several meetings were held among members of the Turnpike Authority and Hunt during mid-September of 1962 at which a price for damages for the old property was agreed upon and at which Hunt indicated that, subject to the approval of the Board of Directors, Rivett, Lathe & Grinder, Inc. would purchase a portion of land in the Faneuil Dump area for one hundred thousand dollars ($100,000.) if access and utilities were provided for.

A meeting was arranged by William Callahan with Mayor Collins at which time Mr. Hunt explained to the Mayor that he preferred to relocate his plant in the Brighton area since a survey of his personnel had shown that they would rather work in this area where most of them lived. Nothing was said at this meeting about the Massachusetts Turnpike Authority taking private land. The Mayor indicated that he was anxious to retain industry in Boston and after a discussion of tax assessments Hunt held several meetings with Mr. Brauneis, the Commissioner of Assessing, culminating in a letter dated October 4, 1962 setting forth proposed assessments for the years 1963, 1964, 1965.

At one of the meetings in mid-September, Hunt was told by Mr. Callahan that the proposed relocation of Newton Street would not continue as previously planned to the Newton City line but would stop somewhere in the Faneuil Dump area and that a reserve strip would have to be retained for the future extension of this road into Newton. At this time Mr. Hunt had no precise knowledge as to the exact location of the new re-located Newton Street. As a matter of fact, as will be developed later, the precise plans and working drawings for re-located Newton Street were being developed by the engineers during a period beginning at the middle of June 1962 and running through the Spring of 1963 when final approval of utilities locations were approved.

Because of the location of re-located Newton Street de-

cided upon by the engineers it turned out that it would be impossible to locate the Rivett, Lathe & Grinder, Inc. plant wholly on former railroad land as shown on Exhibit 12. The re-location of Newton Street, as finally determined, deprived Rivett, Lathe & Grinder, Inc. of some 44,000 square feet of relatively level land and necessitated adding a similar area including a hillside rising approximately 30 feet above the average ground level and required the use of some of the land to support the slope of re-located Newton Street. In addition, data obtained from more ground test borings showed that the foundation cost of the building would be more than anticipated. As a result of these considerations, the purchase price agreed on for the land to be bought by Rivett, Lathe & Grinder, Inc. was reduced to eighty thousand ($80,000) dollars. (See Exhibits 24, 25 & 26). A formal purchase and sale agreement (Exhibit 15) was entered into between the Massachusetts Turnpike Authority and Rivett, Lathe & Grinder, Inc. dated January 17, 1963. I find that the execution of this agreement was duly authorized by the Turnpike Authority and by the Board of Directors of Rivett, Lathe & Grinder, Inc. It should be noted that the land to be sold and purchased under this agreement is not the same as outlined in red on the plan dated October 9, 1962, attached to the purchase and sale agreement but rather includes an area between the southerly border of the former Boston & Albany land and the northerly side of re-located Newton Street. The area actually to be conveyed is properly described in the purchase and sale agreement. It should also be noted that Exhibit 15 places the time for performance as sixty days after the Massachusetts Turnpike Authority obtains the land of others and also provides that Rivett, Lathe & Grinder, Inc., at its own risk and expense, may enter upon the property for the purpose of site preparing or construction of its new plant as soon as the Authority obtains

title to such portion of the premises which were not then owned by the Authority. The land of the petitioner Village on the Hill, was as previously stated, taken by the Turnpike Authority on October 18, 1962. To date there has been no conveyance of the premises from the Turnpike Authority to Rivett, Lathe & Grinder, Inc. and legal title to the premises including the building which is in the process of being constructed thereon therefore remains in the Massachusetts Turnpike Authority although I find that it is the present intention of the parties to go through with and fulfill the terms of the purchase and sale agreement (Exhibit 15). By letter dated December 4, 1962, (Exhibit 32), it had been indicated by the Turnpike Authority that there would be no objection to Rivett, Lathe & Grinder, Inc. proceeding with construction of the building on the proposed site.

In the meanwhile, meetings had been held among Hunt, representatives of the Turnpike and representatives of Perini Corporation, the General Contractor for the toll road extension relative to the time when Rivett, Lathe & Grinder, Inc. would have to vacate its old plant. Rivett, Lathe & Grinder, Inc. agreed with representatives of Perini that it would be out of its old plant within six months after construction started on the new plant. Lockwood-Greene was unable to prepare a plan for a plant and complete construction within a six month period. Mr. Hunt, therefore, looked into the feasibility of constructing a prefabricated plant and on October 8, 1962 engaged the services of Carlson Construction Corp., the local representative of Butler Manufacturing Co. (Exhibit 8). A formal contract between Carlson Construction Corp. and Rivett, Lathe & Grinder, Inc., dated December 5, 1962 was signed on January 2, 1963 (Exhibit 9). In the application for building permits made by Carlson Construction Corp. to the City, it was indicated that Rivett, Lathe & Grinder, Inc.

was the owner of the building. I find that the representatives of the Carlson Construction Corp. were not aware of the legal niceties of the situation in which title had not yet passed to Rivett, Lathe & Grinder, Inc. but considered Rivett, Lathe & Grinder to be the owner in view of the agreement that construction could start on the site.

The plans from which the building is being constructed and is located on the ground were prepared by Carlson Construction Corp. in October of 1962. The Carlson Construction Corp. started the work of clearing and site preparation on November 14, 1962. During December 1962, many car loads of materials were delivered to the site and two cranes were working there. I find, however, that petitioners are not barred by laches as a result of obvious work or construction going on at this time.

Before the work on the Turnpike extension was undertaken, Newton Street was a public way from Brooks Street to approximately the point where it joined with Charlesview Street. From this point proceeding in a westerly direction old plans show a private way called Newton Street leading to the property of the Boston & Albany Railroad. This private way part of Newton Street was a paper street only and had never been developed. As a result of relocating the railroad tracks it became necessary (as shown on Exhibit 13C) to re-locate a part of Newton Street that was the public way.

The original plans for the Turnpike extension were made from assessors plans and U. S. Geodetic maps which did not show a great deal of detail or topographical data and were made only for the purpose of planning the general line and location of the turnpike extension. This line and location of the Turnpike extension was approved by the Department of Public Works in 1960. Naturally after the bonds were sold and the time came for actually constructing the extension more detailed data were necessary and actual

on the ground studies and surveys were made. Howard, Needles, Tamen and Bergendoff designed the turnpike extension; DeLeuw, Cather & Co. were subcontractors under Howard, Needles to prepare construction plans. The original plans in 1960 showed Newton Street extended through the former railroad property continuing on a straight line westward into Newton. However, in June of 1962, detailed studies were undertaken by DeLeuw, Cather & Co. to determine the best way to re-locate and extend Newton Street (see Exhibits 47, 48, 49). On July 26, 1962, DeLeuw, Cather & Co. forwarded to Howard, Needles its proposed plan (Exhibit 53) for the re-location and extension of Newton Street. This was the first plan in which the Newton Street extension was made to swing in a southerly direction beyond the Boston & Albany Railroad property, which necessitated the taking of the land of the Petitioner. As of June 11, 1962 (See Exhibit 45), instructions had been given that Newton Street was not to be extended over the City of Newton line but was to serve only the Faneuil yard area. In this letter it was also suggested that in order to avoid affecting a nursing home under construction on Pigelow Street that it would be necessary to re-locate Newton Street further north than originally planned. Because of the hilly nature of the land in this area "the top of the cut" in the original plan would have affected the nursing home. Because in extending Newton Street to connect with Charlesview Street the grade of Newton Street was excessive (in excess of 10%, see Exhibit 52), it became necessary to change the grade of Newton Street at the point where it connects with Charlesview Street. Once this was done, from an engineering standpoint, it was also necessary to bring the Newton Street extension toward Presentation Road in order to avoid excessive fill and excessive grade down into the former railroad property and also to provide for a more level connection with Presentation Road and

Tilton Street, when and if they are extended to meet Newton Street as re-located. I find that in determining the location and direction of re-located Newton Street that DeLeuw, Cather & Co. acted according to its best judgment based upon sound engineering principles and in no way was influenced to attempt to circle the former railroad property in order to provide a location for the new Rivett, Lathe & Grinder, Inc. plant. As a matter of fact, as previously narrated, the decision to sell property for a plant site for the new Rivett, Lathe & Grinder, Inc. plant was not made by the Turnpike Authority until sometime in September of 1962. Once the decision was made and approved as to where to re-locate and extend Newton Street, further studies and plans had to be drawn in order to accurately delineate the taking of the Petitioner's land. This necessitated a good deal of time and work and made necessary a delay in the actual takings of the Petitioner's land.

The possibility that at sometime in the future the City of Newton might wish to have Newton Street extended into Newton itself made it necessary for the engineers and the Turnpike Authority to reserve a strip of land as shown on the plan attached to Exhibit 15. I find that it is only coincidence that the Newton Street extension ends at the approximate point of the parking lot to be built in connection with the new Rivett, Lathe & Grinder, Inc. plant. The final plans for the re-location and extension of Newton Street necessitated the taking of only a little more private property than would have been necessary if Newton Street had been extended as originally planned in 1960. However, the plan as finalized made it necessary to take the property belonging to the petitioner rather than property belonging to others further to the east. Once the decision was made to avoid taking property which would affect the nursing home and other private houses in the Bigelow Street area it became necessary to change the grade of Newton Street

in the vicinity of Charlesview Street and this necessitated extending Newton Street through the land of the Petitioner rather than down a steep hill into the former railroad property.

I find that no part of the old private way which was known as Newton Street (paper street) is being used for the turnpike extension itself nor for the railroad easement nor for the purpose of re-locating any public utilities. I find that the Department of Public Works, on or about August 28, 1962, approved the re-location of that part of old Newton St. which was a public way but has never been requested to approve the re-location or extension of that part of Newton Street which was a private way. I rule that there is no statutory necessity for Department of Public Works approval of the re-location of a private way.

Chapter 354 of the Acts of 1952, § 7 provides in part:

> "If the Authority shall find it necessary to change the location of any portion of any *public highway*, it shall reconstruct the same at such location as the Authority may deem more favorable, with the approval of the State Department of Public Works, and of substantially the same type and in as good condition as the original highway. . . . In exercising the power herein granted, the Authority may take private property in the name of a city or town by exercise of the power of eminent domain as provided in Chapter 79 of the General Laws."

The taking of the land of the Petitioner was made in the name of the City of Boston and the City approved the location of Newton Street extended and the plans for the utilities therein.

However, as pointed out above, the Turnpike Authority, in this case, not only changed the location of a portion of a public highway, but also changed the location and extended that part of Newton Street which was a private way

and had formerly existed only on paper. I rule that the Turnpike Authority, by implication, was granted the power to re-locate and extend portions of a private way if, as in this case, such re-location was necessary as a result of the change of location of that portion of Newton Street which was a public highway. I find that the final plans extending and re-locating that portion of Newton Street which was a private way was done by the engineers and the Turnpike Authority in good faith and according to sound engineering principles.

I find and rule that the Massachusetts Turnpike Authority did not take the Petitioner's land for the purpose of sale or lease of the same to Rivett, Lathe & Grinder, Inc. for its private use or accomodation. I find and rule that the Massachusetts Turnpike Authority did not take land of the Petitioner under the guise of public need with a design of depriving the Petitioner of its property for the private need of Rivett, Lathe & Grinder, Inc.

I take the following action on requests for rulings submitted by Village on the Hill, Inc.:

1. Allowed.
2. Allowed.
3. Denied.
4. Denied.
5. Allowed.
6. Allowed.
7. Allowed.
8. Allowed.
9. Granted.
10. Denied.
11. Allowed; as I have previously found, the re-location of the private way was not necessary to the construction, maintenance, repair or operation of the express toll highway but was necessary as a result of

the re-location of that portion of Newton Street which was a public way.

12. Allowed.

13. Allowed; but I rule that the approval of the Department of Public Works is not necessary for the relocation of a private way.

14. Allowed.

15. Allowed.

16. Granted.

I, therefore, ORDER that a decree be entered declaring that the taking by the Turnpike Authority of the Petitioner's property was a valid exercise of the power granted to the said Authority by the General Court.

VINCENT R. BROGNA
Justice of the Superior Court

Entered:
September 4, 1963.

2. *Order Amending Findings, Rulings and Order for Decree Previously Entered*

The Findings, Rulings and Order for Decree previously entered in this case dated September 4, 1963 are hereby amended as follows:

1. By adding after the second line of page 6 (line 12, page 359 of this record):

> "At the time of the view taken by the Court the manufacturing building being constructed for Rivett Lathe & Grinder, Inc. was nearing completion and ready for the installation of machinery of the said Rivett Lathe & Grinder, Inc. The parking lot adjacent to and to be used with the said building had

been staked out and graded in rough form. Work has continued on the building and parking lot during and subsequent to the hearings."

2. By adding after the first sentence of the first complete paragraph on page 10 (first sentence, first complete ¶, page 362 of this record):

"I further find that at the time of the taking of the Petitioner's land the engineers planning the Turnpike, and the members of the Turnpike Authority knew that no part of the Petitioner's land was to be used for the Turnpike Extension itself (actual roadway), or for the Railroad easements, or for the re-location of any public utilities;

3. By deleting the last full sentence on page 7 (line 26, page 360 of this record—"The original plane . . .") and substituting therefor:

"The original plans made in 1960 showed Newton Street extended through the former Railroad property, continuing on a straighter (less curved) line westward into Newton."

4. By deleting from page 8 (line 9, page 361 of this record) the sentence reading, "Because in extending Newton Street to connect with Charlesview Street the grade of Newton Street was excessive (in excess of 10%, see Exhibit 52), it became necessary to change the grade of Newton Street at a point where it connects with Charlesview Street." And inserting in place thereof:

"On the original (1960) plan for extending Newton Street the grade at its connection with Charlesview

would have been excessive (in excess of 10%, see Exhibit 52). When Newton Street was relocated farther north to avoid the nursing home, the grade of Newton Street up to its connection with Charlesview Street was increased so that its high point was at or about its connection with Charlesview."

VINCENT R. BROGNA
Justice of the Superior Court

Entered: October 4, 1963.

3. *Final Decree*

This cause came on to be heard and was argued by counsel and thereupon upon consideration thereof, it is ORDERED, ADJUDGED and DECREED:

1. That the taking by the Massachusetts Turnpike Authority of the property of the Petitioner was a taking for a public purpose and not for the private need of Rivett, Lathe & Grinder, Inc.

2. That the taking by the Massachusetts Turnpike Authority of the property of the Petitioner was a valid exercise of the power granted to the said Authority by the General Court.

By the Court (BROGNA, J.)
MARY A. KELLEY, Asst Clerk.

Entered: October 4, 1963.

Appendix D

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. UNITED STATES CONSTITUTION, FIFTH AMENDMENT.

> "[N]or shall private property be taken for public use without just compensation."

2. UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT.

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ."

3. MASSACHUSETTS STATUTES 1952, c. 354, AS AMENDED BY MASSACHUSETTS STATUTES 1955, c. 47 AND MASSACHUSETTS STATUTES 1958, c. 384.

> SECTION 1. MASSACHUSETTS TURNPIKE.—The Massachusetts Turnpike Authority (hereinafter created) is hereby authorized and empowered, subject to the provisions of this act, to construct, maintain, repair and operate at such location as may be approved by the state department of public works a toll express highway, to be known as the 'Massachusetts Turnpike', from a point in the vicinity of the city of Boston or from a point or points within said city to a point at or near the boundary line between the Commonwealth and the State of New York or such part or parts thereof as it may determine, and to issue turnpike revenue bonds of the Authority, payable solely from revenues, to finance such turnpike.
>
> • • •

SECTION 5. GENERAL GRANT OF POWERS — The Authority is hereby authorized and empowered—

(f) To acquire sites abutting on the turnpike and to construct or contract for the construction of buildings and appurtenances for gasoline stations, restaurants and other services and to lease the same for the above purposes in such manner and under such terms as it may determine.

* * *

(k) To acquire in the name of the Authority by purchase or otherwise, on such terms and conditions and in such manner as it may deem proper, or by the exercise of the power of eminent domain in accordance with the provisions of chapter seventy-nine of the General Laws or any alternative method now or hereafter provided by general law, insofar as such provisions may be applicable, such public lands, parks, playgrounds, reservations, cemeteries, highways or parkways or parts thereof or rights therein, and any fee simple absolute or any lesser interest in such private property as it may deem necessary for carrying out the provisions of this act, including any fee simple absolute in, easements upon, or the benefit of restrictions upon, abutting property to preserve and protect the turnpike; provided, however, that whenever a parcel of private property so taken is used in whole or part for residential purposes, the owner or owners of said parcel may, within thirty days of the date of the Authority's notice to vacate such parcel, appeal to the Authority for a postponement of the date set for vacating, whereupon the Authority shall grant to the owner or owners of the property a postponement of

three months from the date of such appeal; provided, however, that the appeal for such postponement shall be in the form of a written request to the Authority sent by registered mail, return receipt requested; . . . St. 1952, c. 354, S 5.

SECTION 7. INCIDENTAL POWERS (second paragraph)

* * *

If the Authority shall find it necessary to change the location of any portion of any public highway, it shall reconstruct the same at such location as the Authority shall deem most favorable, with the approval of the state department of public works, and of substantially the same type and in as good condition as the original highway. The cost of such reconstruction and any damage incurred in changing the location of any such highway shall be ascertained and paid by the Authority as a part of the cost of the turnpike. *In exercising the power herein granted, the Authority may take private property in the name of a city or town by exercise of the power of eminent domain as provided in chapter seventy-nine of the General Laws.* (Emphasis supplied)

* * *

Appendix E

THE RAISING OF THE FEDERAL QUESTION

1. *Petitioner's Bill in Equity.*

"8. Your plaintiff is informed and believes and therefore avers that the defendant, Massachusetts Turnpike Authority, did not in fact deem it necessary to take the plaintiff's land for the purpose of constructing, maintaining, repairing or operating the Turnpike but actually took the said land for the purpose of sale or lease of the same to the defendant, Rivett Lathe & Grinder, Inc., for its private use.

"9. Your plaintiff is informed and believes and therefore avers that the defendant, Massachusetts Turnpike Authority, did not in fact deem it necessary to take the plaintiff's land in connection with the construction, maintenance, repair and operation of the Turnpike, to construct and relocate a portion of a private way (Newton Street) but actually took said land for the private use of accommodating the defendant, Rivett Lathe & Grinder, Inc.

"10. Your plaintiff is informed and believes and therefore avers that prior to November 7, 1962, the date of recording of the said Order of Taking, the defendants, Massachusetts Turnpike Authority and Rivett Lathe & Grinder, Inc., had entered into negotiations for the sale or lease of a substantial portion of the plaintiff's land to the defendant, Rivett Lathe & Grinder, Inc., for its private use.

"11. Your plaintiff is informed and believes and therefore avers that after the taking under said Order of Taking, the defendant Massachusetts Turnpike Authority did in fact sell or lease a substantial portion of the plaintiff's land taken thereunder to the defendant, Rivett Lathe & Grinder, Inc., for its private use.

* * *

"14. The plaintiff is informed and believes and therefore avers that the defendants acting in concert are in the process of carrying out a pre-conceived plan and designing to deprive the plaintiff of its property for the sole benefit of the defendant, Rivett Lathe & Grinder, Inc. They are using the guise of public need to take the plaintiff's property when in truth and in fact there is no public need and they are acting for the private need of the defendant, Rivett Lathe & Grinder, Inc.

"15. The plaintiff says that the defendants have acted and are acting in bad faith; that their actions are arbitrary and unreasonable; that they are misusing the power of eminent domain entrusted to the Massachusetts Turnpike Authority by the Legislature; that they are attempting to deprive the plaintiff of its property in violation of Article 10 of the Massachusetts Constitution and the 14th Amendment of the Federal Constitution; that their proposed plan is discriminatory and beyond the powers of the Massachusetts Turnpike Authority and is clearly illegal in purpose and enactment." [1 R. 3-4]

2. *Petitioner's Request For Rulings and the Court's Rulings.*

"3. As matter of law, the evidence discloses that no public purpose was served or was to be served by the taking of the plaintiff's land." ["3. Denied." (2 R. 363, App. A, *supra*, p. C-10)]

"4. As matter of law, the evidence discloses that the so-called relocation of a private way called Newton Street was a mere subterfuge in an attempt to justify the taking of plaintiff's land for the benefit of the defendant, Rivett Lathe & Grinder, Inc." ["4. Denied." (2 R. 363, App. A, *supra*, p. C-10)]

"7. As matter of law, if the primary purpose of the taking was to benefit the defendant, Rivett Lathe & Grinder,

Inc., the fact that there might be an incidental benefit to some members of the public in the future does not justify the taking." ["7. Allowed." (2 R. 363, App. A, *supra*, p. C-10)]

"11. As matter of law, there is no evidence to warrant a finding by the Court that the relocation of the private way was necessary or incidental to the construction, maintenance, repair and operation of the express toll highway." ["11. Allowed; as I have previously found, the re-location of the private way was not necessary to the construction, maintenance, repair or operation of the express toll highway but was necessary as a result of the re-location of that portion of Newton Street which was a public way." (2 R. 364, App. A, *supra*, pp. C-10-C-11)]

"12. As matter of law, there is no evidence to warrant a finding by the Court that the relocation of the private way was necessary or incidental to the relocating of public utilities, including rail lines." ["12. Allowed." (2 R. 364, App. A, *supra*, p. C-11)]

3. *Petitioner's Allegations on Appeal.*

"1. The taking of plaintiff's land was invalid and illegal because it was not for Turnpike purposes but was actually taken for the purpose of sale or lease to the defendant Rivett for the private use of the latter.

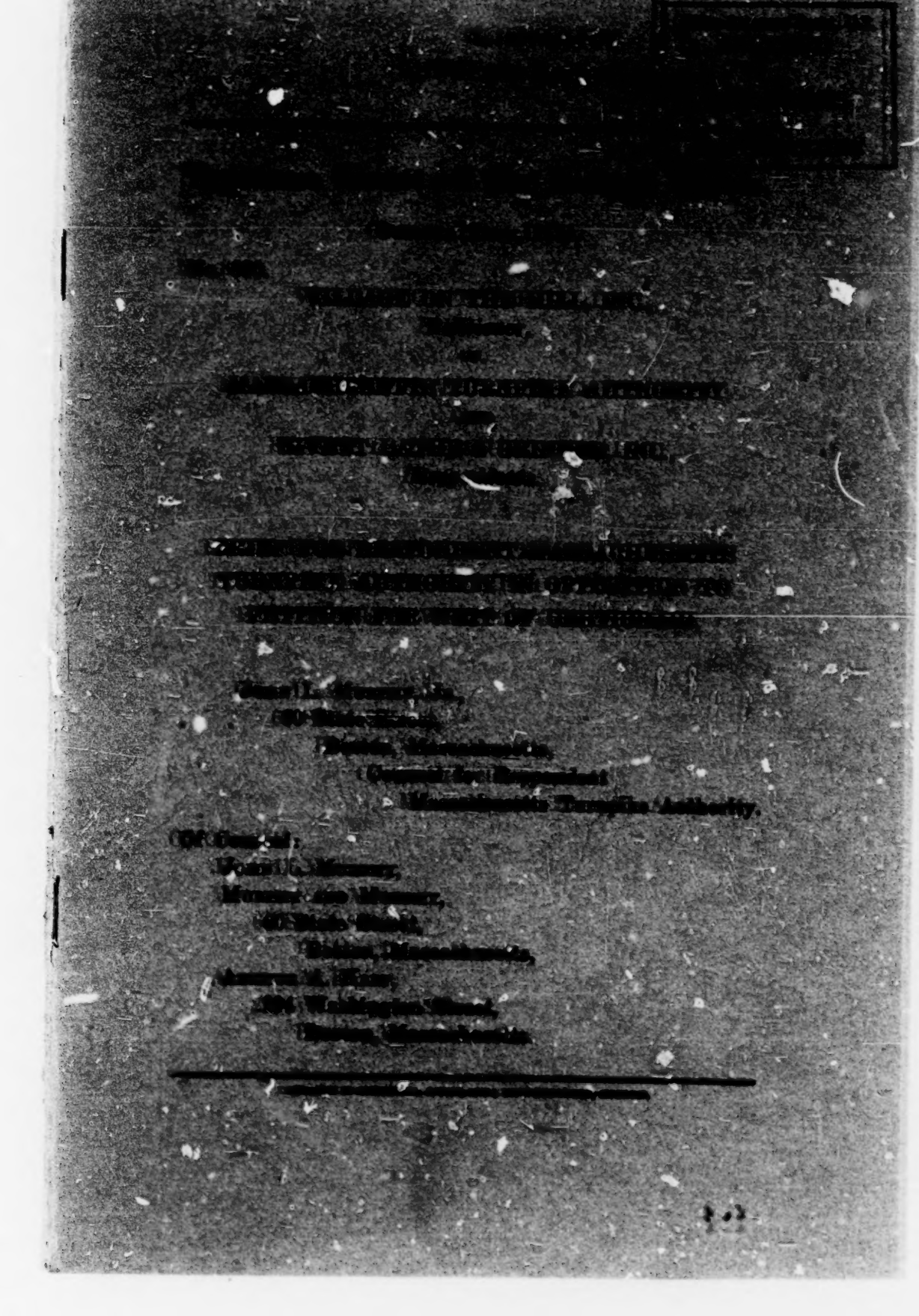
"2. The taking was not for a public purpose but rather for the private use and accommodation of the defendant Rivett.

"3. The taking was illegal and invalid because the defendant Authority prior to the taking entered into an agreement to sell land, part of which included plaintiff's land, to the defendant Rivett.

"4. The taking was illegal and invalid because it was made in furtherance of a pre-conceived plan between the defendant Authority and defendant Rivett to provide land,

which included the plaintiff's land, to the defendant Rivett for its private use.

"5. The defendants have acted arbitrarily and unreasonably and in bad faith and have misused the power of eminent domain entrusted to the Authority by the Legislature; that they are attempting to deprive the plaintiff of its property in violation of Article 10 of the Massachusetts Constitution and the 14th Amendment of the Federal Constitution; that their plan is discriminatory and beyond the powers of the Authority and is clearly illegal in purpose and enactment." [Pl. Br. 2-3.]



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STATUTE.

St. 1952, c. 354

§ 5 7

§ 7 2, 7

Supreme Court of the United States.

OCTOBER TERM, 1964.

No. 890.

VILLAGE ON THE HILL, INC.,
Petitioner,

v.

MASSACHUSETTS TURNPIKE AUTHORITY
AND
RIVETT LATHE & GRINDER, INC.,
Respondents.

BRIEF FOR RESPONDENT MASSACHUSETTS TURNPIKE AUTHORITY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The opinion of the Supreme Judicial Court of Massachusetts is reported in 1964 Mass. Adv. Sh. 1245, and is printed in Appendix A of the Petition. The findings, rulings, order for decree, amendments and final decree of the Massachusetts Superior Court are unreported and are printed in Appendix C of the Petition.

Jurisdiction.

The jurisdiction requisites are adequately set forth in the Petition.

Statutes Involved.

In addition to the portions of Massachusetts Statutes, 1952, c. 354, as amended by Massachusetts Statutes, 1955, c. 47, and Massachusetts Statutes, 1958, c. 384, which are set forth in the petition (Appendix D, pp. D1-D3), the following portions thereof are pertinent:

> "SECTION 5. *General Grant of Powers.*—The Authority is hereby authorized and empowered—
>
> . . . . . .
>
> "(*j*) To acquire, hold and dispose of real and personal property in the exercise of its powers and the performance of its duties under this act;
>
> . . . . . .
>
> "(*p*) To do all acts and things necessary or convenient to carry out the powers expressly granted in this act."
>
> "SECTION 7. *Incidental Powers.*—
>
> . . . . . .
>
> "The Authority . . . shall sell, if a sale be practicable, or if not, shall lease, if a lease be practicable, any lands or rights or interest in lands or other property taken or purchased for the purposes of this act, whenever the same shall, in the opinion of the Authority, cease to be needed for such purpose. . . ." (St. 1952, c. 354, § 7.)

Question Presented.

Whether this Court should grant a writ of certiorari to review a determination by the highest court of the Commonwealth of Massachusetts that an eminent domain taking of certain private property by a state turnpike authority was for a public purpose and was within the powers

granted to said state authority by the Legislature of Massachusetts.

Statement of the Case.

This respondent adopts as its statement of this case the facts as stated in the opinion of the Supreme Judicial Court, which is printed in the Petition (Appendix A), and as set forth in the findings of the trial court, contained in the opinion of the Superior Court, which is printed in the Petition (Appendix C).

Argument.

I. THIS HONORABLE COURT SHOULD ACCEPT THE HIGHEST STATE COURT'S DETERMINATION AS TO THE VALIDITY OF THE TAKING UNLESS IT IS CLEARLY WRONG.

Where, as in the instant case, the assignments of error come to the single point as to the character of the use, and the highest state court has declared the use to be a public one, this Honorable Court should accept the judgment of said state court unless it is clearly without merit and is wholly unreasonable.

Union Lime Co. v. *Chicago & Northwestern Railway Co.*, 233 U.S. 211, 218 (1913).

Clark v. *Nash*, 198 U.S. 361, 369 (1904).

Fallbrook Irrigation District v. *Bradley*, 164 U.S. 112, 160 (1896).

Jones v. *City of Portland*, 245 U.S. 217, 221, 222 (1917).

Hairston v. *Danville & Western Railway Co.*, 208 U.S. 598, 607 (1907).

Rindge Co. v. *County of Los Angeles*, 262 U.S. 700, 705, 706 (1922).

The question as to whether a use for which private property is taken is public or private is a judicial question, the

determination of which is influenced by local conditions; and this Court, while enforcing the Fourteenth Amendment, should keep in view the diversity of such conditions, and regard with great respect the judgments of state courts upon what should be deemed public uses.

Rindge Co. v. *County of Los Angeles, supra,* 705, 706.

Fallbrook Irrigation District v. *Bradley, supra,* 160.

In the *Fallbrook* case, the Court said: "It never was intended that the court should, as the effect of the [Fourteenth] amendment, be transformed into a court of appeal, where all decisions of state courts involving merely questions of general justice and equitable considerations in the taking of property should be submitted to this court for its determination. The final jurisdiction of the courts of the States would thereby be enormously reduced and a corresponding increase in the jurisdiction of this court would result, and it would be a great misfortune in each case." (P. 157.)

II. The Decision Below is Clearly Correct.

The trial court found that the taking was for a public purpose and that it was a valid exercise of the power granted to this respondent by the state Legislature (Petition, Appendix C, p. C-13). In reviewing this case on the petitioner's appeal, the highest state court found: "The ultimate conclusions of fact of the trial judge are supported by his subsidiary findings and are not shown by the reported evidence to be plainly wrong in any material respect" (Petition, Appendix A, p. A-8). This highest state court affirmed the trial court's final decree (Petition, Appendix B).

The decision of the Supreme Judicial Court in the case at hand was in complete harmony with well-settled law both within and without the Commonwealth.

A number of decisions have answered questions of law involved in this case:

(*a*) A taking for a highway is clearly for a public purpose.

Talbot v. *Hudson*, 16 Gray 417, 423.
Rindge Co. v. *County of Los Angeles, supra*, 706.

(*b*) The taking of private land for the extension of a public way to make land of the taking agency more accessible is a taking for a public use even though the land which is thereby made more accessible may be leased or sold to private persons.

Wright v. *Mayor & City Council of Cambridge*, 238 Mass. 439.
Luke v. *Massachusetts Turnpike Authority*, 337 Mass. 304.

(*c*) That the number of probable users of a way may not be large or that the way may enure directly to the benefit of individual owners abutting thereon does not make such way any less a public work for the construction of which private property may well be taken.

Talbot v. *Hudson, supra*, 423.
Denham v. *County Commissioners of Bristol*, 108 Mass. 202.
Luke v. *Massachusetts Turnpike Authority*, 337 Mass. 304, 311.
Rindge Co. v. *County of Los Angeles*, 262 U.S. 700, 707.

(*d*) "It has never been deemed essential that the entire community or any considerable portion of it should directly

enjoy or participate in an improvement or enterprise, in order to constitute a public use, within the true meaning of these words as used in the Constitution. Such an interpretation would greatly narrow and cripple the authority of the legislature, so as to deprive it of the power of exerting a material and beneficial influence on the welfare and prosperity of the State. In a broad and comprehensive view, such as has been heretofore taken of the construction of this clause of the Declaration of Rights, everything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the State, or which leads to the growth of towns and the creation of new sources for the employment of private capital and labor, indirectly contributes to the general welfare and to the prosperity of the whole community."

Talbot v. *Hudson, supra,* 425.
Wright v. *Mayor & City Council of Cambridge, supra,* 441.

(*e*) "Whether the taking is for a public purpose is a subject for judicial examination. *Boston* v. *Talbot,* 206 Mass. 82, 89-90. *Burnham* v. *Mayor & Aldermen of Beverly,* 309 Mass. 388, 390. *McAuliffe & Burke Co.* v. *Boston Housing Authority,* 334 Mass. 28, 30. And if the taking is for a public purpose, the necessity for the appropriation is not a judicial question, but a legislative one, irrespective of whether the determiuation was by the Legislature or by public officers to whom the Legislature has delegated the power. *Tate* v. *Malden,* 334 Mass. 507, 508. *Hayeck* v. *Metropolitan District Commission,* 335 Mass. 372, 375. *Court Strect Parking Co.* v. *Boston,* 336 Mass. 224, 230."

Luke v. *Massachusetts Turnpike Authority,* 337 Mass. 304, 307, 308.
Rindge Co. v. *County of Los Angeles, supra,* 709.

(*f*) The taking of more land than was to become permanently a part of the highway does not invalidate the taking.

Boston v. *Talbot*, 206 Mass. 82, 90.
Luke v. *Massachusetts Turnpike Authority*, 337 Mass. 304, 309-310.
Robie v. *Massachusetts Turnpike Authority*, 1964 Mass. Adv. Sh. 1067.
Rindge Co. v. *County of Los Angeles*, *supra*, 705, 709.

(*g*) It is appropriate for the Authority to sell or lease portions of lands purchased or taken by it which are in excess of its needs.

St. 1952, c. 354, §§ 5 (j), 7.
Petition, Appendix (p. A-9).

III. The Petitioner's Arguments are Inapplicable to the Instant Case.

The omission of material facts from the "Statement" in the petition renders specious and inapplicable the "Questions Presented" by the petitioner. The sketch plan in the Supreme Judicial Court opinion (Petition, Appendix p. A-3) and the following facts from the record demonstrate this:

(1) This Reserved Area is a strip of land, fifty feet wide, which is reserved for future extension of a road into the City of Newton (Petition, p. 17, Appendix, p. A-5-6).

(2) The newly constructed road ends at this Reserved Area (Petition, Appendix, p. A-3).

(3) This Reserved Area *is not* included in the purchase and sale agreement between the respondents (Petition, Appendix, p. A-6, R. 2-337-338).

(4) By the purchase and sale agreement the respondent Rivett is given a license to use this area, for parking of vehicles and other uses, until such time as the relocated street is extended therein and provided such uses shall not interfere with any uses or requirements therein of this respondent (R. 2-379).

(5) The Reserved Area provides access for other land of this respondent which is not included in the purchase and sale agreement, and which lies in the City of Newton and abuts the Newton-Boston boundary line, and which would otherwise be inaccessible to a highway (R. 3-22).

Upon completion of its construction the Newton Street Extension will become a local public way (R. 1-12). The taking of the petitioner's land in connection with the laying out of the Newton Street Extension is for a public purpose, *i.e.*, a highway.

With the exception of the case of *Rindge Co.* v. *County of Los Angeles*, 262 U.S. 700, which is also cited by the respondent, the cases cited by the petitioner have no relevance to the law of the Commonwealth of Massachusetts or the facts of the instant case. The case of *Missouri Pacific Railway Co.* v. *Nebraska*, 164 U.S. 403, cited by the petitioner on page 13 of its petition, is clearly distinguishable from the instant case. In the *Missouri Pacific* case the attempted transfer of property was exclusively for a private purpose, with no reference to any benefit to the public in general. In the instant case, the Massachusetts courts held that the taking was primarily for a public purpose, and that any private benefit that may have resulted was simply a "by-product" of the taking, and did not invalidate it (Petition, Appendices A and B). And this Court has

also held that, where property is taken for a purpose which is primarily public, it will not be invalidated because of any incidental private benefit that may have accrued from it.

Hendersonville Light & Power Co. v. *Blue Ridge Interurban Railway Co.*, 243 U.S. 563.
Hairston v. *Danville & Western Railway Co.*, 208 U.S. 598.

Conclusion.

On the state level the petitioner's complaints have been fully litigated. On the federal level they do not raise any constitutional questions that have not already been decided by this Court.

For these reasons, this petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1964

No. 880.

VILLAGE ON THE HILL, INC.,
Petitioner,
v.
MASSACHUSETTS TURNPIKE AUTHORITY
AND
RIVETT LATHE & GRINDER, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR RESPONDENT RIVETT LATHE & GRINDER, INC., IN OPPOSITION.

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Supreme Court of the United States.

OCTOBER TERM, 1964.

No. 890.

VILLAGE ON THE HILL, INC.,
Petitioner,

v.

MASSACHUSETTS TURNPIKE AUTHORITY

AND

RIVETT LATHE & GRINDER, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR RESPONDENT RIVETT LATHE & GRINDER, INC., IN OPPOSITION.

Respondent Rivett Lathe & Grinder, Inc. (hereinafter called "Rivett"), opposes the petition for a writ of certiorari to review the judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts entered in the above-entitled action on November 12, 1964.

Jurisdiction.

The petition for certiorari alleges that "the jurisdiction of this Court is invoked under 28 USC § 1257(3)" (Petition,

p. 2). This section authorizes this Court to review State Court decisions where, among other things, "any title, right, privilege or immunity is . . . claimed under the Constitution . . . of . . . the United States." No such question is here involved. As clearly appears from Appendix E of the petition, entitled "The Raising of the Federal Question," the petitioner, plaintiff below, made certain allegations in its bill in equity substantially to the effect that the defendant Massachusetts Turnpike Authority (hereinafter called "MTA") did not deem it necessary to take petitioner's land to construct, operate and maintain a turnpike or to reconstruct a portion of a private way, Newton Street, but took it for the purpose of selling it to Rivett for the private use and accommodation of Rivett; that the MTA and Rivett, acting in concert, were in the process of carrying out a preconceived plan to deprive petitioner of its property for the sole benefit of Rivett, when there was no public need; that the MTA and Rivett acted in bad faith, misusing the powers of eminent domain entrusted to the MTA and are attempting to deprive the petitioner of its property in violation of Article 10 of the Massachusetts Constitution and the Fourteenth Amendment of the Federal Constitution; that their proposed plan is discriminatory, beyond the powers of the MTA and clearly illegal (Petition, App. E, pp. E-1, E-2).

The Massachusetts Superior Court, the trial court, after lengthy hearings, found and ruled:

> "I rule that the Turnpike Authority, by implication, was granted the power to re-locate and extend portions of a private way if, as in this case, such relocation was necessary as a result of the change of location of that portion of Newton Street which was a public highway. I find that the final plans extending and re-locating that portion of Newton Street which

was a private way was done by the engineers and the Turnpike Authority in good faith and according to sound engineering principles.

"I find and rule that the Massachusetts Turnpike Authority did not take the Petitioner's land for the purpose of sale or lease of the same to Rivett, Lathe & Grinder, Inc. for its private use or accommodation. I find and rule that the Massachusetts Turnpike Authority did not take land of the Petitioner under the guise of public need with a design of depriving the Petitioner of its property for the private need of Rivett, Lathe & Grinder, Inc." (Petition, pp. 10-13, App. C, p. C-10)—

and thereupon entered a final decree as follows:

"1. That the taking by the Massachusetts Turnpike Authority of the property of the Petitioner was a taking for a public purpose and not for the private need of Rivett, Lathe & Grinder, Inc.

"2. That the taking by the Massachusetts Turnpike Authority of the property of the Petitioner was a valid exercise of the power granted to the said Authority by the General Court." (Petition, App. C, p. C-13.)

The petitioner appealed to the Massachusetts Supreme Judicial Court, which affirmed the final decree of the trial court (Petition, App. B, p. B-1), and in its opinion stated:

"1. The case was heard upon evidence consisting of numerous exhibits and voluminous oral testimony. The ultimate conclusions of fact of the trial judge are supported by his subsidiary findings and are not shown by the reported evidence to be plainly wrong in any material respect." (Petition, App. A, p. A-8.)

It is obvious that the petitioner's allegations in its bill in equity were not found to be true and therefore constitute no more than unfounded allegations. In this petition the petitioner in effect is asking this Court to find the facts differently from the facts found by the Massachusetts Superior and Supreme Judicial Courts. To be more precise, since the only witnesses who testified as to the transactions between MTA and Rivett were the president of Rivett, officers of the MTA, and employees of independent engineering firms employed by MTA to lay out the takings and relocate Newton Street, all of whom expressly denied the truth of the allegations of the petitioner, it is really asking this Court to disbelieve the witnesses and make inferences exactly contrary to the express testimony in the case.

Clearly this raises no substantial federal question under 28 U.S.C. § 1257 (3). At the most it raises a question of whether the findings were supported by the evidence. In a recent case in which similar factual issues had been decided against the appellant, his appeal to this Court was summarily dismissed. *Grisanti* v. *City of Cleveland*, 371 U.S. 68, 83 S. Ct. 111 (1962).* For the same reasons, this petition should be summarily denied.

Questions Presented.

As stated previously, the petitioner brought a bill in equity, under the Massachusetts Declaratory Judgment Act (Massachusetts General Laws, c. 231A), seeking a declaration of the rights of the parties growing out of the

*The proceedings below and the facts in this case may be found in *Grisanti* v. *City of Cleveland*, 180 Ohio 2d 143, 179 N.E. 2d 798; affirmed by Court of Appeals of Ohio in 89 Ohio Abs. 1, 181 N.E. 2d 299, and by the Supreme Court of Ohio in 173 Ohio St. 386, 182 N.E. 2d 568.

taking by the MTA of certain portions of land belonging to the petitioner. The gist of the claim was that the defendants acted in concert so that the MTA took by eminent domain the petitioner's property "for the private use and benefit of" Rivett (Petition, p. 3).

The case was heard at length by a judge of the Superior Court of Massachusetts, who filed extensive findings of fact, culminating in the ultimate findings that the MTA did not take the petitioner's land for the purposes of sale or lease of the same to Rivett for its private use or accommodation or under the guise of public need with a design of depriving the petitioner of its property for the private need of Rivett (Petition, App. C, p. C-10). The trial court entered a final decree in accordance with the foregoing findings (Petition, App. C, p. C-13), whereupon petitioner appealed to the Massachusetts Supreme Judicial Court.

That Court, after hearing, filed an opinion in which, among other things, it held that "The ultimate conclusions of fact of the trial judge are supported by his subsidiary findings and are not shown by the reported evidence to be plainly wrong in any material respect" and that the MTA had ample power to take the land in question for the purposes stated in the order of taking (Petition, App. A, p. A-8).

In such circumstances the only question presented to this Court is whether the ultimate finding of the trial court, based upon extensive testimony and supported by its subsidiary findings of fact that the MTA did not take land of Village, Inc., for the private use or accommodation of Rivett, which ultimate finding of fact has been reviewed and sustained by the highest court of the Commonwealth of Massachusetts, constitutes a deprivation of the property of Village, Inc., without due process of law, in violation of the Fourteenth Amendment to the United States

Constitution, having in mind that under the Massachusetts Constitution and statutes, G.L. c. 79, §§ 6 and 12 (Appendix A, p. 26), the MTA is obligated to pay to the petitioner the fair cash value of property taken from it by eminent domain.

Merely to state the question discloses not only that it is not a federal question, but also that it must be answered in the negative.

Constitutional Provisions and Statutes Involved.

In addition to the constitutional provisions and statutes set forth in Appendix D to the petition, additional provisions of the Massachusetts statute conferring powers upon the MTA and of the statutes dealing with damages in eminent-domain proceedings are set forth in Appendix A hereto.

Statement.

A. Findings of the Trial Court.

As indicated above, the trial court filed an extensive opinion and made findings of fact which were affirmed by the Massachusetts Supreme Judicial Court. Such findings of fact are complete and accurate in all respects, and we are therefore quoting substantially all of the trial court's findings as the statement of facts and have inserted after each finding of fact the reference to the pages of the record and to the exhibits which support such findings.*

*In so doing we adopt the method of referring to the record set forth in footnote 1 on page 2 of the petition. The findings as originally made (2R. 355-363) were amended in certain minor respects (2R. 366), and we are reproducing them in their amended form. The findings, the order amending them, and the final decree of the trial court are also printed as Appendix C to the petition.

"The Massachusetts Turnpike Authority by order of taking designated as No. B37 [Exhibit A to plaintiff's bill in equity, 1 R. 8-18], dated October 18, 1962 and recorded in the Land Court in Suffolk Registry District on November 7, 1962, purported to take in fee simple certain land of the plaintiff described in said order and certain permanent easements in the land of the plaintiff further described in said order, which recited that the taking was 'for the purpose of constructing, maintaining, repairing and operating as an express toll highway in accordance with the location approved by the State Department of Public Works on April 12, 1960, a road in the City of Boston, County of Suffolk, "Boston Extension" of the Massachusetts Turnpike, and for the purpose of relocating public utilities, rail lines in connection therewith; for the purpose of relocating and constructing a portion of a private way (Newton Street) and for the purpose of performing such other work as may be deemed necessary in connection therewith . . .' [1R. 8-9].

"Rivett, Lathe & Grinder, Inc. owned and operated, for many years, a plant at 20 Riverview Road, Brighton (1R. 37]. Its president, Mr. Albert Hunt [1R. 36], first heard that the plant was in danger of being taken for the extension of the turnpike sometime in 1957 [1R. 38] at which time, after a meeting with Mr. William Callahan, the Chairman of the Turnpike Authority [1R. 39], was advised to begin to look for possible sites upon which to relocate his plant [1R. 39, 117-119]. He examined sites in Lowell, Brockton, Lexington, Waltham [1R. 117, 119] and in July of 1959, he and his wife purchased a parcel of land in Waltham [1R. 52] and gave an option to Rivett, Lathe & Grinder, Inc. to repurchase it for a plant site at the same price which he and his wife had paid. An engineering firm, Lockwood and Greene, was engaged to prepare a preliminary study of plant requirements including area and plant

lay-out [1R. 52, 53]. Interest lagged for a while when the plans for selling the turnpike bonds were postponed, but in January or February of 1961, Hunt went to the office of the Massachusetts Turnpike Authority to inquire about any possible changes in plans [1R. 118] and was given a copy of a plan dated March 14, 1960 (Exhibit 13B)* which indicated that the railroad tracks were to be moved toward the river, the turnpike would be located to the south of the railroad and that it would go right through the location of his plant [1R. 117, 118]. Sometime in March of 1961, a representative of the Massachusetts Turnpike Authority indicated to Mr. Hunt that there might be surplus land in the so-called Faneuil Dump area and would be available for building purposes [1R. 118]. This area consisted of land owned by the Boston & Albany Railroad [Exhibit 13A] which the Massachusetts Turnpike Authority had a right to purchase. Several conferences took place at which Hunt indicated that he would be interested in relocating his plant in this area depending upon factors such as test boring, utilities and access roads [1R. 118-120]. Because the turnpike bonds did not sell until March of 1962 [2R. 287] nothing further was done until mid-July 1962 when Lockwood-Greene prepared a sketch (Exhibit 12) [1R. 59, 121, 3R. 22] showing a proposed plant within the confines of the Faneuil Dump area previously owned by the Boston & Albany Railroad.†

"Several meetings were held among members of the Turnpike Authority and Hunt during mid-September of 1962 [1R. 123-128, 131-136] at which a price for damages for the old property was agreed upon [1R. 132] and at

*Mr. Hunt's testimony was that he actually received this plan and another plan of the same date showing land further to the west (Exhibit 13A) in April, 1962 (1R. 120). These exhibits are reproduced in 3R. at pp. 23 and 24.

† This plan was prepared from Exhibits 13A and B (1R. 121).

which Hunt indicated that, subject to the approval of the Board of Directors, Rivett, Lathe & Grinder, Inc. would purchase a portion of land in the Faneuil Dump area for one hundred thousand dollars ($100,000.) if access and utilities were provided for [1R. 135-136, 190].

"A meeting was arranged by William Callahan with Mayor Collins [1R. 79, 136] at which time Mr. Hunt explained to the Mayor that he preferred to relocate his plant in the Brighton area since a survey of his personnel had shown that they would rather work in this area where most of them lived [1R. 137]. Nothing was said at this meeting about the Massachusetts Turnpike Authority taking private land [1R. 73-74]. The Mayor indicated that he was anxious to retain industry in Boston [1R. 138] and after a discussion of tax assessments Hunt held several meetings with Mr. Brauneis, the Commissioner of Assessing, culminating in a letter dated October 4, 1962 setting forth proposed assessments for the years 1963, 1964, 1965 [1R. 138-139, Exhibit 18].

"At one of the meetings in mid-September, Hunt was told by Mr. Callahan that the proposed relocation of Newton Street would not continue as previously planned to the Newton City line but would stop somewhere in the Faneuil Dump area and that a reserve strip would have to be retained for the future extension of this road into Newton [1R. 134]. At this time Mr. Hunt had no precise knowledge as to the exact location of the new re-located Newton Street [1R. 134, 135]. As a matter of fact, as will be developed later, the precise plans and working drawings for relocated Newton Street were being developed by the engineers during a period beginning at the middle of June 1962 and running through the Spring of 1963 when final approval of utilities locations were approved [1R. 262-278, 290].

"Because of the location of re-located Newton Street decided upon by the engineers it turned out that it would be impossible to locate the Rivett, Lathe & Grinder, Inc. plant wholly on former railroad land as shown on Exhibit 12 [1R. 142-144]. The re-location of Newton Street, as finally determined, deprived Rivett, Lathe & Grinder, Inc. of some 44,000 square feet of relatively level land and necessitated adding a similar area including a hillside rising approximately 30 feet above the average ground level and required the use of some of the land to support the slope of re-located Newton Street [Exhibit 24, 3R. 29]. In addition, data obtained from more ground test borings showed that the foundation cost of the building would be more than anticipated [Exhibit 24]. As a result of these considerations, the purchase price agreed on for the land to be bought by Rivett, Lathe & Grinder, Inc. was reduced to eighty thousand ($80,000.) dollars. (See Exhibits 24, 25 & 26). [3R. 27, 18-20.] A formal purchase and sale agreement (Exhibit 15) [2R. 377] was entered into between the Massachusetts Turnpike Authority and Rivett, Lathe & Grinder, Inc. dated January 17, 1963 [3R. 377]. I find that the execution of this agreement was duly authorized by the Turnpike Authority [1R. 154] and by the Board of Directors of Rivett, Lathe & Grinder, Inc. [1R. 145, 146]. It should be noted that the land to be sold and purchased under this agreement is not the same as outlined in red on the plan dated October 9, 1962 [1R. 141], attached to the purchase and sale agreement but rather includes an area between the southerly border of the former Boston & Albany land and the northerly side of re-located Newton Street. The area actually to be conveyed is properly described in the purchase and sale agreement [2R. 377-378]. It should also be noted that Exhibit 15 places the time for performance as sixty days after the Massachusetts Turnpike Authority obtains the land of others [2R. 379] and

also provides that Rivett, Lathe & Grinder, Inc., at its own risk and expense, may enter upon the property for the purpose of site preparing or construction of its new plant as soon as the Authority obtains title to such portion of the premises which were not then owned by the Authority [2R. 380]. The land of the petitioner Village on the Hill, was as previously stated, taken by the Turnpike Authority on October 18, 1962. To date there has been no conveyance of the premises from the Turnpike Authority to Rivett, Lathe & Grinder, Inc. and the legal title to the premises including the building which is in the process of being constructed thereon therefore remains in the Massachusetts Turnpike Authority although I find that it is the present intention of the parties to go through with and fulfill the terms of the purchase and sale agreement (Exhibit 15) [1R. 65, 66]. By letter dated December 4, 1962, (Exhibit 32) [3R. 32], it had been indicated by the Turnpike Authority that there would be no objection to Rivett, Lathe & Grinder, Inc. proceeding with construction of the building on the proposed site [1R. 197].

"At the time of the view taken by the Court the manufacturing building being constructed for Rivett Lathe & Grinder, Inc. was nearing completion and ready for the installation of machinery of the said Rivett Lathe & Grinder, Inc. The parking lot adjacent to and to be used with the said building had been staked out and graded in rough form. Work has continued on the building and parking lot during and subsequent to the hearings [1R. 65].

"In the meanwhile, meetings had been held among Hunt, representatives of the Turnpike [1R. 125, 128] and representatives of Perini Corporation, the General Contractor for the toll road extension [1R. 129-131] relative to the time when Rivett, Lathe & Grinder, Inc. would have to vacate its old plant. Rivett, Lathe & Grinder, Inc. agreed with representatives of Perini that it would be out of its

old plant within six months after construction started on the new plant [1R. 131]. Lockwood-Greene was unable to prepare a plan for a plant and complete construction within a six month period [1R. 139]. Mr. Hunt, therefore, looked into the feasibility of constructing a prefabricated plant [1R. 140] and on October 8, 1962 engaged the services of Carlson Construction Corp. [1R. 44, 141], the local representative of Butler Manufacturing Co. (Exhibit 8) [2R. 376]. A formal contract between Carlson Construction Corp. and Rivett, Lathe & Grinder, Inc., dated December 5, 1962 [1R. 45] was signed on January 2, 1963 (Exhibit 9).* In the application for building permits made by Carlson Construction Corp. to the City, it was indicated that Rivett, Lathe & Grinder, Inc. was the owner of the building [1R. 201]. I find that the representatives of the Carlson Construction Corp. were not aware of the legal niceties of the situation in which title had not yet passed to Rivett, Lathe & Grinder, Inc. but considered Rivett, Lathe & Grinder to be the owner in view of the agreement that construction could start on the site [1R. 201-202].

"The plans from which the building is being constructed and is located on the ground were prepared by Carlson Construction Corp. in October of 1962 [1R. 143-144]. The Carlson Construction Corp. started the work of clearing and site preparation on November 14, 1962 [1R. 204]. During December 1962, many car loads of materials were delivered to the site and two cranes were working there [1R. 209-211]. I find, however, that petitioners are not barred by laches as a result of obvious work or construction going on at this time.

"Before the work on the Turnpike extension was undertaken, Newton Street was a public way from Brooks Street

*This exhibit has not been reproduced in the Record.

to approximately the point where it joined with Charlesview Street [2R. 247]. From this point proceeding in a westerly direction old plans show a private way called Newton Street leading to the property of the Boston & Albany Railroad [2R. 353].* This private way part of Newton Street was a paper street only and had never been developed. As a result of re-locating the railroad tracks it became necessary (as shown on Exhibit 13C)† to re-locate a part of Newton Street that was the public way.

"The original plans for the Turnpike extension were made from assessors plans and U.S. Geodetic maps which did not show a great deal of detail or topographical data and were made only for the purpose of planning the general line and location of the turnpike extension [2R. 240, 289, 337-338]. This line and location of the Turnpike extension was approved by the Department of Public Works in 1960 [1R. 32, Exhibit 2, Pl. Br. p. 43]. Naturally after the bonds were sold and the time came for actually constructing the extension more detailed data were necessary and actual on the ground studies and surveys were made [1R. 240]. Howard, Needles, Tamen and Bergendoff designed the turnpike extension [1R. 236]; DeLeuw, Cather & Co. were subcontractors under Howard, Needles to prepare construction plans [1R. 237]. The original plans made in 1960 showed Newton Street extended through the former railroad property continuing on a straighter (less curved) line westward into Newton [Exhibits 13A and 13B, 3R. 23, 24]. However, in June of 1962, detailed studies were undertaken by DeLeuw, Cather & Co. to determine

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*Private-way Newton Street also appears on a number of not-so-old plans, *e.g.*, the plans attached to plaintiff's certificates of title, Exhibits 5A and 5B (3R. 9, 13, 17).

† Exhibit 13C has not been printed. See also Exhibit 2 (Pl. Br., p. 43).

the best way to re-locate and extend Newton Street [2R. 263-264] (see Exhibits 47, 48, 49) [3R. 46-49]. On July 26, 1962, DeLeuw, Cather & Co. forwarded to Howard, Needles its proposed plan (Exhibit 53) [3R. 56] for the re-location and extension of Newton Street. This was the first plan in which the Newton Street extension was made to swing in a southerly direction beyond the Boston & Albany Railroad property, which necessitated the taking of the land of the Petitioner [2R. 266].* As of June 11, 1962 (see Exhibit 45) [3R. 44], instructions had been given that Newton Street was not to be extended over the City of Newton line but was to serve only the Faneuil yard area [2R. 262]. In this letter it was also suggested that in order to avoid affecting a nursing home under construction on Bigelow Street that it would be necessary to re-locate Newton Street further north than originally planned [2R. 262]. Because of the hilly nature of the land in this area 'the top of the cut' in the original plan would have affected the nursing home [2R. 262]. On the original (1960) plan for extending Newton Street [Exhibits 13A and 13B, 3R. 23, 24] the grade at its connection with Charlesview would have been excessive (in excess of 10%, see Exhibit 52) [3R. 55]. When Newton Street was relocated farther north to avoid the nursing home, the grade of Newton Street up to its connection with Charlesview Street was increased so that its high point was at or about its connection with Charlesview [2R. 267]. Once this was done, from an engineering standpoint, it was also necessary to bring the Newton Street extension toward Presentation Road in order to

*It is possible to infer from this statement that no earlier plan for the relocation of the Newton Street extension would have required the taking of any of the petitioner's land. However, an examination of the S.J.C. Plan (Petition, Appendix A, p. A-3) indicates clearly that, even under the 1960 plan, some portion of the plaintiff's land would have been taken.

avoid excessive fill and excessive grade down into the former railroad property and also to provide for a more level connection with Presentation Road and Tilton Street, when and if they are extended to meet Newton Street as relocated [2R. 268, 333]. *I find that in determining the location and direction of re-located Newton Street that DeLeuw, Cather & Co. acted according to its best judgment based upon sound engineering principles* [2R. 286, 333] *and in no way was influenced to attempt to circle the former railroad property in order to provide a location for the new Rivett, Lathe & Grinder, Inc. plant* [2R. 288, 289, 292, 343, 349-350]. *As a matter of fact, as previously narrated, the decision to sell property for a plant site for the new Rivett, Lathe & Grinder, Inc. plant was not made by the Turnpike Authority until sometime in September of 1962* [1R. 135-136]. [Emphasis supplied.] Once the decision was made and approved as to where to re-locate and extend Newton Street, further studies and plans had to be drawn in order to accurately delineate the taking of the Petitioner's land [2R. 263]. This necessitated a good deal of time and work and made necessary a delay in the actual takings of the Petitioner's land [2R. 262-280; Exhibits 45-62, 3R. 45-71].

"The possibility that at sometime in the future the City of Newton might wish to have Newton Street extended into Newton itself made it necessary for the engineers and the Turnpike Authority to reserve a strip of land as shown on the plan attached to Exhibit 15. I find that it is only coincidence that the Newton Street extension ends at the approximate point of the parking lot to be built in connection with the new Rivett, Lathe & Grinder, Inc. plant [2R. 286]. The final plans for the re-location and extension of Newton Street necessitated the taking of only a little more private property than would have been necessary if Newton Street had been extended as originally planned in 1960. However, the plan as finalized made it necessary to take the property

belonging to the petitioner rather than property belonging to others further to the east.* Once the decision was made to avoid taking property which would affect the nursing home and other private houses in the Bigelow Street area it became necessary to change the grade of Newton Street in the vicinity of Charlesview Street and this necessitated extending Newton Street through the land of the Petitioner rather than down a steep hill into the former railroad property [2R. 268, 333].

"I find that no part of the old private way which was known as Newton Street (paper street) is being used for the turnpike extension itself nor for the railroad easement nor for the purpose of re-locating any public utilities. I further find that at the time of the taking of the Petitioner's land the engineers planning the Turnpike, and the members of the Turnpike Authority knew that no part of the Petitioner's land was to be used for the Turnpike Extension itself (actual roadway), or for the Railroad easements, or for the re-location of any public utilities; I find that the Department of Public Works, on or about August 28, 1962, approved the re-location of that part of old Newton St. which was a public way [1R. 32, Exhibit 2, Pl. Br., p. 43] but has never been requested to approve the relocation or extension of that part of Newton Street which was a private way. I rule that there is no statutory necessity for Department of Public Works approval of the re-location of a private way.

[The court then quotes from chapter 354 of the Acts of 1952, § 7, printed in Appendix D to the Petition, p. D-3.]

"The taking of the land of the Petitioner was made in the name of the City of Boston [Exhibit A to Plaintiff's Bill,

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[*This can be most easily seen by an examination of the plan printed as part of the opinion of the Massachusetts Supreme Judicial Court. Petition, App. A, p. A-3.]

Section 4, 1R. 12-15]* and the City approved the location of Newton Street extended and the plans for the utilities therein [1R. 238-239].

"However, as pointed out above, the Turnpike Authority, in this case, not only changed the location of a portion of a public highway, but also changed the location and extended that part of Newton Street which was a private way and had formerly existed only on paper. I rule that the Turnpike Authority, by implication, was granted the power to re-locate and extend portions of a private way if, as in this case, such re-location was necessary as a result of the change of location of that portion of Newton Street which was a public highway. I find that the final plans extending and re-locating that portion of Newton Street which was a private way was done by the engineers and the Turnpike Authority in good faith and according to sound engineering principles.

"I find and rule that the Massachusetts Turnpike Authority did not take the Petitioner's land for the purpose of sale or lease of the same to Rivett, Lathe & Grinder, Inc. for its private use or accommodation. I find and rule that the Massachusetts Turnpike Authority did not take land of the Petitioner under the guise of public need with a design of depriving the Petitioner of its property for the private need of Rivett, Lathe & Grinder, Inc." (2R. 363.) (Emphasis supplied.)

A somewhat shorter statement of the facts, but an accurate and complete statement, appears in the opinion of the Massachusetts Supreme Judicial Court in Appendix A of the petition at pages A1-A8. This statement contains a

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[*Not all of the petitioner's land was taken in the name of the city. For example, the land described in section 1 of this exhibit, which was taken by the Turnpike, includes land of the plaintiff (1 R. 10).]

most helpful plan of the locus at page A3,* as well as explanatory footnotes. We will not reproduce this statement here, but incorporate it by reference.

B. Correction of Errors in Petition.

It will be noted at once that in a number of respects the facts as found by the Massachusetts courts vary substantially from the statement of facts set forth on pages 3-10 of the petition. While we will not enumerate all of these variances, there are certain misstatements which are so material as to require correction.

(1) On pages 4 and 5 of the petition it is stated: "Hunt [president of Rivett] was well aware [in July, 1962] that private land would therefore be needed for the site (1R. 60, 85)." Neither of the record references supports this assertion. The most that can be said was that in July, 1962, Hunt had received from the MTA plans (Exhibits 13A and 13B, 3R. 23-24) of the entire area, on which his engineers—unknown to the MTA (2R. 254, 280, 351)—laid out a possible location for a plant (Exhibit 12, 3R. 22). If one examines these exhibits closely, it can be seen that a small portion of the proposed plant extends over a line which is marked "Existing B & A [railroad] Property Line." Taken at face value, this would indicate that, if the plant were built as then laid out on that sketch, a part of it would lie on land other than former railroad land, but Hunt did not know it was owned by plaintiff. Indeed, so far as Hunt knew at that time, this could have been land already owned by the Turnpike or under contract for purchase by it from some other owner, as was the case with the Railroad land.

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*Hereafter referred to as the "SJC Plan."

(2) On page 5 of the petition petitioner states that the proposal of the subcontractors to the MTA consulting engineers for the revised relocation and extension of Newton Street "was such as to necessitate taking a portion of the petitioner's land." Taken literally, this statement is true, but in the context in which it is made there is an inference that it was the revised relocation that occasioned the taking of a portion of petitioner's land. Actually, as can be seen from the S.J.C. Plan, the *1960* proposal for the relocation of Newton Street required taking a portion of the petitioner's land. The 1960 proposal was made a year before March of 1961 when the possibility of Rivett's buying MTA land for a new factory was just mentioned (1R. 118). The revision made in June or July of 1962 of the layout of Newton Street resulted in more of the petitioner's land being taken in one area (Area No. 2 on the S.J.C. Plan) and substantially less in two other areas (Area Nos. 1 and 3 on the S.J.C. Plan). *For present purposes it is extremely important to note that all of the land on which the Rivett building was finally erected was included in the 1960 proposal* (2R. 320).

(3) On page 7 of the petition it is stated that "Rivett's proposal [of October 29, 1962] to relocate its plant further to the right of the old site in the Faneuil Dump area required the taking of more of petitioner's land than was originally planned on July 19." This statement is wrong thrice over. In the first place, as the record clearly establishes, there was no change whatever in the land to be taken under the plan for the Newton Street Extension which was made in June and July of 1962 and the land which was actually taken in the fall of 1962 (2R. 280). Secondly, the SJC Plan indicates clearly that, while the July, 1962, plan required the taking of slightly more land of the petitioner in one area of the proposed relocation than had been planned in 1960, that plan also involved the taking of less

land from the petitioner in other areas. While there is no direct evidence as to the net result, the plan itself would indicate that Village, Inc., gained about as much as it lost. Finally, and most important, the statement implies that it was the relocation of the plant further to the right that occasioned a taking of the petitioner's land, but the record (1R. 142-144) clearly establishes, and the trial judge found (2R. 358, *supra*, p. 10), that the converse is true, viz., it was the change in the area of the land to be taken occasioned by the June, 1962, revision of the relocation of Newton Street that required the change in the location of the plant.

(4) On page 9 of the petition it is stated that "in accordance with the October 29 plan . . . MTA undertook to construct relocated Newton Street to serve as an access to Rivett . . ." We have already pointed out that the MTA had planned to construct relocated Newton Street to serve as an access to the Faneuil Dump Area as early as 1960 (Exhibits 13A and B, 3R. 23, 24) By October of 1962 it had become clear that in fact Rivett was to occupy the Faneuil Dump Area, but the inference that the MTA constructed Newton Street at the behest of Rivett is wholly erroneous.

Reasons for Denying the Writ.

A. The only question presented by the petition is one of fact which should not be reviewed by this Court.

The basic and fundamental reason for denying the writ in the present case is that, once the facts are clearly understood, it is apparent that what Village on the Hill, Inc., the petitioner, is asking of this Court is that it review and reverse a factual determination to the effect that the property in question was not in fact taken for the private use and benefit of Rivett. This issue is not one which presents

any special and important reasons why this Court should exercise its discretionary power of review. *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U.S. 508, 44 S. Ct. 164 (1924). *Houston Oil Co. of Texas* v. *Goodrich*, 245 U.S. 440, 38 S. Ct. 140 (1918). While the questions involved have significance for the parties, they involve no "principles the settlement of which is of importance to the public as distinguished from that of the parties." *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393, 43 S. Ct. 422 (1923).

B. The record supports the finding made by the trial court and approved by the Supreme Judicial Court of Massachusetts that the taking of petitioner's land was for a public purpose.

Even if this Court were to review the determination made by the trial court, however, it would find, as did the highest court in Massachusetts, that such determination is clearly supported, if not required, by the reported evidence. The S.J.C. Plan clearly illustrates that (1) the land taken from the petitioner on which the Rivett plant is now located was a part of the area which the MTA had determined to take in 1960, long before Rivett and the MTA ever thought of the purchase or sale of MTA land to Rivett (2R. 320), and (2) practically all of the land ultimately sold to Rivett was not land which had been taken from the petitioner, but was land which was purchased by the MTA from the railroad in a transaction which no one now questions (Petition, p. 4). Furthermore, it is abundantly clear from the record that the layout of Newton Street which determined the land to be taken from Village, Inc., was established solely by DeLeuw-Cather, an independent engineering firm acting as consultant to the MTA on the basis of its best judgment and engineering knowledge, and was designed to meet the problems of grade and future street and utility connections and had nothing to do with Rivett (2R. 267-269). In

fact, at the time the changes were made, none of the personnel concerned had any idea that Rivett had any interest in the area (2R. 254, 280, 351).

The 1960 plan for the relocation of Newton Street was modified in 1962 to take account of the engineering problems arising out of the steep grade in the vicinity of Charlesview Street and the decision not to extend Newton Street beyond the Boston city line at that time (2R. 267-269). With these factors in mind, the relocation of Newton Street was finally established and put on a plan dated July 26, 1962 (Exhibit 53, 3R. 56). The final location of Newton Street, the taking lines delineating the area necessary to be taken for this purpose, and the precise areas of the land to be taken were all established some months prior to and, in any event, no later than this date (2R. 270, 280).

It was over a month after this date that the actual negotiations between Rivett and the MTA for the purchase of the land took place (1R. 125-136). These negotiations culminated in agreement to the purchase by Rivett of the railroad land and the small portion of the land to be taken from the petitioner which would be isolated by the construction of Newton Street (1R. 135-136), but it is abundantly clear that, if Rivett had never appeared on the scene at all, the property of the petitioner which was taken in Order of Taking B-37 (Plaintiff's Bill in Equity, Exhibit A, 1R. 8-18) would have been taken in any event.

The record clearly establishes, and the trial judge found, that the MTA planned from the very beginning to relocate Newton Street so as to provide access to the Faneuil Dump area and to connect with future streets in Newton (see Exhibits 13A and 13B, 3R. 23, 24). There can be no serious doubt that these purposes are public purposes (see, *e.g.*, *Rindge Co.* v. *County of Los Angeles*, 262 U.S. 700, 705-707, 43 S. Ct. 689 (1923); *Luke* v. *Massachusetts Turnpike Authority*, 337 Mass. 304, 149 N.E. 2d 225 (1958)), and both the

trial court and the highest court of Massachusetts so held. None of the cases cited in the petition have any tendency whatever toward a contrary conclusion.* In such circumstances this Court should accept the judgment of the Commonwealth of Massachusetts on this matter as expressed through its highest court. *Union Lime Co.* v. *Chicago & Northwestern Railway Co.*, 233 U.S. 211, 218, 34 S. Ct. 522 (1914). *Hairston* v. *Danville & Western Railway Co.*, 208 U.S. 598, 607, 28 S. Ct. 331 (1908). No argument has been made, and indeed no argument could be made successfully, that it was not within the powers of the Massachu-

*In *Missouri Pacific Railway Co.* v. *Nebraska*, 164 U.S. 403, 17 S. Ct. 130 (1896), as the Court pointed out, the order "was not, and was not claimed to be, either in the opinion of the court below, or in the argument for the defendant in error in this court, a taking of private property for a public use under the right of eminent domain." (Page 416.) In *Rindge Co.* v. *County of Los Angeles, supra*, this Court held that a highway was a public use even though it came to a dead end, and that the resolutions of the legislative body to the effect that the taking in question was necessary in the public interest were conclusive on this question. In *Opinion of the Justices*, 261 Mass. 556, at pages 611-612 (159 N.E. 70, at page 83) (1928), the Massachusetts Supreme Judicial Court held that the Boston Elevated Railway Company could not be required to sell its assets to the Commonwealth under proposed legislation which expressly provided for the transfer of such assets to a new private corporation. The only question presented in *Porter* v. *Charleston*, 65 F. Supp. 224 (S.D. W. Va. 1946), was whether the city could evict tenants of property taken for playground purposes without getting a permit from the Office of Price Administration. In *Duluth* v. *Duluth Street Railway*, 179 Minn. 548, 229 N.W. 883 (1930), the Minnesota court disagreed with a city council resolution declaring that public convenience and necessity required extension of a street railway. In *Board of Education* v. *Baczewski*, 340 Mich. 265, 65 N.W. 2d 810 (1954), the state court held that a jury's determination of the necessity for the taking (such determination being required by the Michigan Constitution) could be reversed where the jury had proceeded on the wrong theory and where the errors complained of were such as could fairly be said to have controlled the result.

setts legislature to pass an Act enabling the MTA to take land by eminent domain and to permit it to sell any unneeded land taken. It was the MTA's right, if not duty, to consider the cost of acquiring that which would be needed permanently, and it was perfectly proper to take the relatively small portion that was to be cut off and isolated if "in reference to the probable damages that would be awarded for a jury [to the balance of the property] . . . and for interference with the use of it, this seemed reasonably necessary to an economical management of the business in their charge." *Boston* v. *Talbot*, 206 Mass. 82, at 92, 91 N.E. 1014 (1910). The Act itself (sections 5 (*k*) and 7, Petition, App. C, pp. D-2, D-3) provides that property shall be taken under chapter 79 of the General Laws of Massachusetts, which in turn clearly requires payment of adequate compensation (Mass. General Laws c. 79, §§ 6, 12, App. A, p. 26).

In the light of the foregoing it is abundantly clear that there has been no violation of the Fourteenth Amendment.

Conclusion.

The petition for a writ of certiorari should be dismissed.

Respectfully submitted,

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Appendix A.

Constitutional Provisions and Statutes Involved.

1. Massachusetts Statutes, 1952, Chapter 354, as Amended by Massachusetts Statutes, 1955, Chapter 47, and Massachusetts Statutes, 1958, Chapter 384.

Section 3. *Massachusetts Turnpike Authority.*—There is hereby created and placed in the state department of public works a body politic and corporate to be known as the "Massachusetts Turnpike Authority", which shall not be subject to the supervision and regulation of the department of public works or of any other department, commission, board, bureau or agency of the commonwealth except to the extent and in the manner provided in this act. The Authority is hereby constituted a public instrumentality, and the exercise by the Authority of the powers conferred by this act in the construction, operation and maintenance of the turnpike shall be deemed and held to be the performance of an essential governmental function. . . .

. . . . . .

Section 7. *Incidental Powers.*— . . . The Authority may sell the buildings or other structures upon any lands taken by it, or may remove the same, and shall sell, if a sale be practicable, or if not shall lease, if a lease be practicable, any lands or rights or interest in lands or other property taken or purchased for the purposes of this act, whenever the same shall, in the opinion of the Authority, cease to be needed for such purpose. The proceeds of any such sale or lease shall be applied toward the cost of the turnpike or deposited to the credit of the sinking fund for the turnpike revenue bonds issued under the provisions of this act. . . .

2. Massachusetts General Laws (Ter. Ed.) Chapter 79.

Section 6. When a taking is made on behalf of a body politic or corporate other than a corporation described in section seven, the board of officers by whom the order of taking is adopted shall, at the time of the adoption thereof, award the damages sustained by every person in his property by reason of such taking. Such award may be amended by said board of officers at any time prior to the payment thereof by reason of a change in ownership or value of said property before the right to damages therefor has become vested or for other good cause shown. Such damages shall be paid by such body politic or corporate unless other provision is made by law. [As amended through St. 1964, c. 579, § 2.]

. . . . . .

Section 12. The damages for property taken under this chapter shall be fixed at the value thereof before the recording of the order of taking, and in case only part of a parcel of land is taken there shall be included damages for all injury to the part not taken caused by the taking or by the public improvement for which the taking is made; and there shall be deducted the benefit accruing to the part not taken unless it was stated in the order of taking that betterments were to be assessed. In determining the damages to a parcel of land injured when no part of it has been taken, regard shall be had only to such injury as is special and peculiar to such parcel, and there shall be deducted the benefit accruing to such parcel, unless it was stated in the order of taking, or if there was no taking in the order for the establishment, construction, alteration, repair or discontinuance of the public improvement which caused the injury, that betterments were to be assessed. Whenever the title or interest taken is such that the property will be exempt from taxation so long as it is held and used for

the purposes for which it is taken, the damages for the taking shall include an amount separately determined and stated which shall be estimated to be equal to that portion of the tax assessed upon the property in the year it is taken which, if the tax were apportioned pro rata according to the number of days in such year, would be allocable to the days ensuing after the taking. [As amended through St. 1959, c. 626, § 4.]

. . . . . .

SECTION 14. A person entitled to an award of his damages under this chapter or the body politic or corporate bound to pay the same, whether a petition has or has not been filed or award made under section six, seven, nine or ten, may petition for the assessment of such damages to the superior court of the county in which the property taken or injured was situated. If a single parcel of land so taken or injured lies in more than one county, the petition may be filed in the superior court of either such county, and the court in which such petition is first filed shall have exclusive jurisdiction thereof and shall assess damages as though the land lay entirely in one county; provided, that if a petition for damages has previously been filed under section eleven, the petition to the superior court shall be filed in the same county. If the land injured lies outside the commonwealth, such petition shall be filed in the superior court of the county in which the public improvement which caused the injury is situated.